Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

81-2337
No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a state's action to quiet title against the United States is subject to the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).*

---

* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint. See Rule 40.3 of the Rules of this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Conclusion	14
Appendix A	1a
Appendix B	14a
Appendix C	17a
Appendix D	29a
Appendix E	31a
Appendix F	33a

TABLE OF AUTHORITIES

Cases:	Page
California v. *Arizona*, 440 U.S. 59	7-8, 12
California ex rel. State Lands Commission v. *United States*, 512 F. Supp. 36	13
California v. *United States*, 132 F. Supp. 208	9
Commonwealth of Puerto Rico v. *United States*, Civil No. 80-2079-C.C. (D.P.R., filed Sept. 24, 1980)	13
Cory v. *White*, No. 80-1556 (June 14, 1982)	11
Government of Guam v. *United States*, Civil No. 82-0001 (D. Guam, filed Jan. 6, 1982)	13
Guaranty Trust Co. v. *United States*, 304 U.S. 126	8, 10
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578	10
Kansas v. *United States*, 204 U.S. 331	7
Munro v. *United States*, 303 U.S. 36	7
Nevada v. *United States*, 628 F.2d 1357, cert. denied, 450 U.S. 995	12
Papasan, Superintendent of Board of Education v. *United States*, Civil No. 81-90 (N.D. Miss., filed June 12, 1981)	13

Cases—Continued Page

Park County, Montana v. *United States*, 626 F.2d 718, cert. denied, 449 U.S. 1112 12
Shively v. *Bowlby*, 152 U.S. 1 4
Soriano v. *United States*, 352 U.S. 270 7-8
United States v. *California*, 332 U.S. 19 9
United States v. *422,978 Square Feet of Land, San Francisco*, 445 F.2d 1180 9
United States v. *Louisiana*, 127 U.S. 182 ..... 9, 11
United States v. *Mitchell*, 445 U.S. 535 7
United States v. *Shaw*, 309 U.S. 495 7
United States v. *Sherwood*, 312 U.S. 584 7
Utah v. *United States*, Civil No. C-79-0302J (D. Utah, filed May 22, 1979) 13
Weber v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 ..... 6, 8, 9-10

Constitution and statutes:

United States Constitution:

Article III, Section 2 8

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* .. 3

5 U.S.C. 701-706 3
5 U.S.C. 702 ..... 5, 11

Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176 (Quiet Title Act) 3

28 U.S.C. 1346(f) 2, 8, 11
28 U.S.C. 2409a 2, 3, 6, 7, 8, 11
28 U.S.C. 2409a(a) 5
28 U.S.C. 2409a(f) 3, 5, 6, 7, 8, 9, 10, 12, 13

Rev. Stat. 1069 (1878 ed.) 9
Submerged Lands Act, 43 U.S.C. 1301 *et seq.* 6
28 U.S.C. 1331 ..... 3, 5
28 U.S.C. 1361 3
28 U.S.C. 2201-2202 3

Miscellaneous:

H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. (1972) .. 10
H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. (1976) .. 11

In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture, the Secretary of the Interior, the Director of the United States Bureau of Land Management, and the Chief of the United States Forest Service, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-13a) is reported at 671 F.2d 271. The opinion of the district court entered on February 4, 1981 (App. C, *infra*, 17a-28a) is reported at 506 F. Supp. 619. The memorandum and order of the district court entered on February 21, 1980 (App. B, *infra*, 14a-16a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1982 (App. E, *infra*, 31a-32a), and a timely petition for

rehearing was denied on March 15, 1982 (App. F, *infra*, 33a). On June 4, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 28 U.S.C. 2409a provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands * * *.
>
> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days * * *.
>
> * * * * *
>
> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

2. 28 U.S.C. 1346(f) provides:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

STATEMENT

1. The United States is the owner of land along the Little Missouri River in North Dakota and claims title to the bed of that river as a riparian landowner (App., *infra*, 3a n.2, 23a). Since at least 1955, the federal government has issued oil and gas leases on the riverbed (*id.* at 2a).

On October 31, 1978, respondent (hereinafter "the State") commenced this action by filing a complaint against predecessors of the petitioning federal officials, seeking to have them enjoined from issuing mineral leases on the riverbed or otherwise exercising privileges of ownership there (App., *infra*, 2a). The complaint alleged that the Little Missouri River had been navigable at the time of the State's admission to the Union in 1889, and that the State had therefore become the owner of the riverbed at that time under the equal footing doctrine. In addition to injunctive relief, the State sought a declaration that the river was "navigable * * * for the purposes of determining ownership of the bed."

The complaint alleged jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S. U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq*). The district court denied cross-motions for summary judgment, but held that the proper basis for the suit was the Quiet Title Act, [1] and directed that the complaint be dismissed unless the State amended it to recite "an adequate jurisdictional basis" (App., *infra*, 14a-16a).

The State filed an amended complaint alleging jurisdiction in part on 28 U.S.C. 2409a and seeking the same injunctive and declaratory relief, although it did not name the United States, whose claim to title it was disputing, as a defendant.

The federal defendants maintained throughout the district court proceedings (1) that the Little Missouri River had not been navigable at the time of the State's entry into the Union and that therefore the riverbed was not sovereign land of the State and (2) that the State's action challenging the federal exercise of ownership over the riverbed was, in any event, barred by the 12-year limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f).

---

[1] The Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, codified at 28 U.S.C. 2409a, 28 U.S.C. 1346(f), and 28 U.S.C. 1402(d).

After a one-day trial, the district court held that the Little Missouri River had been navigable at the time of statehood (App., *infra*, 20a-21a) and that therefore title to the riverbed vested in the State under the equal footing doctrine enunciated in *Shively* v. *Bowlby*, 152 U.S. 1, 26-31 (1894). [2] It further held that the action was not barred by the statute of limitations, because the limitations provision of the Quiet Title Act applied only to natural persons or corporations and not to a "sovereign" with respect to "trust lands held in its sovereign capacity" (App., *infra*, 25a-27a). Because the district court found the limitations provision inapplicable, it did not rule on the federal defendants' allegation that the State had had notice of the federal claim to the riverbed more than 12 years before this lawsuit was brought. [3]

---

[2] The finding of navigability was based on documentary evidence submitted by the State. (The State presented no trial witneses.) The district court relied essentially on (1) an account of a trip down the Little Missouri in 1804 by a French Canadian, Baptiste LePage, who concluded that the river was essentially non-navigable, although apparently he managed the trip in his canoe; (2) a report of a logging operation in 1881-1882 that managed to float some logs down the river, although the enterprise ended in bankruptcy; and (3) some present-day canoe traffic (App., *infra*, 20a-21a.) The court also concluded (*id.* at 21a) that the river has "continue[d] to be navigable to this date."

[3] The government submitted evidence in the district court proceedings showing (1) that the federal riverbed leasing program had been in effect since at least 1955 (Tr. 26-27; Defendants' Exh. I); (2) that five leases issued in 1962 were competitive leases publicly advertised in the State (Tr. 104-107); (3) that an oil company official had written the Land Department of the State Board of University and School Land in 1966, advising the Department that the federal government was issuing leases in the riverbed and that State officials might wish to confer with the Department of the Interior to establish the State's rights in the riverbed (Defendants' Exh. L at 60); (4) that the Bureau of Land Management had, in 1955, sent an inquiry to the State's Attorney General, asking whether, in his view, the Little Missouri River had been navigable at the time of statehood (Exh. to Defendants' Supp. Brief, Dec. 5, 1979; Tr. 123); and (5) that an Assistant

In its final judgment, the court declared, *inter alia* (App., *infra*, 29a-30a), that "[t]itle to the bed of the Little Missouri River within the State of North Dakota, excluding [a specified area], is hereby quieted in the State of North Dakota," and it directed (*id.* at 30a) "the United States" to "cease and desist from further developing or otherwise exercising privileges of ownership" upon that riverbed within the State. [4]

2. On cross-appeals, the court of appeals affirmed the district court's judgment in all respects (App., *infra*, 1a-13a). It concluded (*id.* at 4a-9a) that the limitations provision in the Quiet Title Act, 28 U.S.C. 2409a(f), cannot be asserted by the United States against states, at least where "public trust lands" are concerned. On the merits, it affirmed the district court's finding with respect to navigability of the Little Missouri at the time of the State's admission to the Union (App., *infra*, 10a-13a), although it noted that "the evidence in the record concerning navigability is rather thin" (*id.* at 13a). Because it found district court jurisdiction under the Quiet Title Act, the court of appeals declined to rule on the State's contentions that the federal question provision, 28 U.S.C. 1331, was an adequate jurisdictional basis for the action and that if any statutory waiver of sovereign immunity was required, such a waiver was to be found in the Administrative Procedure Act, 5 U.S.C. 702 (App., *infra*, 4a n.4, 9a; State C.A. Br. 41-47).

In its ruling on the statute of limitations question, the court of appeals started from the premise that, "[u]nder the rule of *quod nullum tempus occurrit regi* the defense of statute of limitations and laches cannot be asserted against a sovereign"

Attorney General had responded, stating that he was informed by "the State Land Commissioner and the Water Conservation Commission that the Little Missouri River is not now and has not been considered navigable" *(ibid.)*.

[4] The portion of the riverbed excluded from the judgment was land within the Fort Berthold Indian Reservation occupied by the Three Affiliated Tribes (App., *infra*, 19a-20a). See 28 U.S.C. 2409a(a). The Tribes were not parties to this litigation (App., *infra*, 19a-20a).

(App., *infra*, 4a), and that in American law, exemplified by *Weber* v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873), the rule is qualified only by an exception for cases in which "the statute expressly designates the sovereign or when the sovereign must necessarily be subject to the statute as determined by legislative intent" (App., *infra*, 5a). The court also emphasized the character of the lands in question as "[p]ublic trust lands," which it defined as "lands held in trust for the citizens of a state [as] distinguished from lands which the State holds in a proprietary capacity" (*ibid.*).

The court noted (App., *infra*, 6a) that states are not specifically mentioned in 28 U.S.C. 2409a(f), which applies to "[a]ny civil action" brought under 28 U.S.C. 2409a, and that they were not expressly referred to in the legislative history of the Quiet Title Act. It found in this congressional silence an intent to exclude the States from the application of this provision of the Act (App., *infra*, 6a). It also concluded (*id.* at 7a), on the basis of the enactment in 1953 of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (which confirmed in the States title to lands beneath waters navigable at the time of statehood) that Congress would find the policies of limitations provisions—notably the desirability of limiting the litigation of stale claims—inapplicable to claims asserted by states.

The court briefly considered the federal defendants' contention that the limitations provision in 28 U.S.C. 2409a(f) is a condition of the waiver of sovereign immunity by the United States and that such waivers must be strictly construed; but it concluded (App., *infra*, 7a) that this was merely a principle to be weighed against the State's immunity from limitations provisions that do not expressly mention the States. In balancing the two, the court concluded (*id.* at 7a-8a) that because "the interest of the people of the State of North Dakota in quieting title to public trust lands is great" and because Congress could, in any event, amend the Quiet Title Act to make the limitations provision expressly applicable to the States, the State's interest should prevail. It rejected authorities cited by the federal defendants, characterizing them (*id.* at 8a-9a) as distinguishable or without precedential value.

REASONS FOR GRANTING THE PETITION

In enacting the Quiet Title Act, Congress declared that "*[a]ny* civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(f) (emphasis added). The court of appeals, without any support in the language of the Act or its legislative history, has held that this provision does not apply to the States. Because the court's decision conflicts with precedents of this Court and of other courts of appeals, and because the issue is important to the application of the Quiet Title Act and other statutes that authorize suits against the United States but subject the authorization to a period of limitation, we seek review by this Court.

1.a This Court has consistently held that the United States may be sued only when it consents to be sued, and that the "terms of its consent to be sued in any court define that court's jurisdiction." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938). This requirement of consent applies to the States as well as to private citizens, for as this Court has observed (*California* v. *Arizona*, 440 U.S. 59, 61-62 (1979), quoting *Kansas* v. *United States*, 204 U.S. 331, 342 (1907)):

> "It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."

It is equally well settled that the terms of the consent to suit—*i.e.*, the conditions on which the United States has agreed to waive its sovereign immunity—are to be strictly observed and that exceptions to those conditions based on implication are not to be recognized. *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

It is through the Quiet Title Act that the United States has consented to suits, like the present action, challenging its claim of title to land. 28 U.S.C. 2409a. *California* v. *Arizona*, *supra*,

440 U.S. at 63-65. [5] The court below has essentially held that the State may avail itself of the benefits of Section 2409a by bringing this action under it, but need not abide by the time limitation Congress placed upon "[a]ny civil action brought under this section." The court has cited no authority that justifies such a refusal to apply the rule that waivers of sovereign immunity must be strictly construed.

b. In support of its conclusion that the terms of the Quiet Title Act waiver should not apply at all to this action, the court cites (App., *infra*, 4a-5a) cases reciting the rule *quod nullum tempus occurrit regi*—that a statute of limitations does not run against a sovereign, either state or federal, unless the sovereign is "expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Weber* v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873). Accord, *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-133 (1938). Because states are not expressly designated in

---

[5] In *California* v. *Arizona*, the Court, seeking to avoid a constitutional question, held that in the jurisdictional provision of the Quiet Title Act, 28 U.S.C. 1346(f), granting exclusive original jurisdiction to federal district courts over actions under 28 U.S.C. 2409a, Congress intended simply to keep such actions out of state courts rather than to deprive the Court of its original jurisdiction, conferred by Article III, Section 2 of the Constitution, over "Cases * * * in which a State shall be Party." The case was thus allowed to proceed in the Court as a suit "brought under [the Quiet Title Act] waiver" (440 U.S. at 65).

The United States asserted a limitations defense against California and Arizona in that action as to some of the land in dispute (440 U.S. at 63 n.4). The areas in question were lands beneath navigable waters that the two States claimed under the "equal-footing" doctrine (*id.* at 60). The United States thereafter litigated its Section 2409a(f) limitations defense before the Special Master, who rejected it on the merits, finding that the United States had not given the States notice as to a definite federal claim more than 12 years before the suit was brought. See *California* v. *Arizona*, No. 78, Original, 1980 Term, Report of the Special Master at 2; Memorandum in Support of Joint Motion for Entry of Decree, App. B, 4a-5a.

28 U.S.C. 2409a(f) or mentioned in its legislative history, the court concluded that the limitations provision should not apply.

But in none of the cases on which the court of appeals relies is the limitations provision a condition on a waiver of sovereign immunity. When the national sovereign invokes a limitations provision that qualifies its consent to suit, that provision applies even against a state, regardless of whether the provision mentions the States. Thus, in *United States* v. *Louisiana*, 127 U.S. 182, 192 (1888), the Court held that Louisiana's monetary claim against the United States was barred by a general limitations provision, Rev. Stat. 1069 (1878 ed.), that, like 28 U.S.C. 2409a(f), contains no specific reference to the States. [6] Accord, *United States* v. *442,978 Square Feet of Land, San Francisco*, 445 F.2d 1180, 1187-1188 (9th Cir. 1971) (general limitations provision in Tucker Act bars State's claim for alleged taking of its property without just compensation); *California* v. *United States*, 132 F. Supp. 208 (Ct.Cl. 1955) (same).

The court of appeals also relies on *Weber* v. *Board of Harbor Commissioners*, *supra*, and *United States* v. *California*, 332 U.S. 19 (1947), for the proposition that where "public trust lands" are concerned, a sovereign cannot be barred by laches or limitations provisions from suing to assert title to them. The reasoning of those cases, however, does not apply where the national sovereign is the party invoking such a defense as to lands that it holds. In *Weber*, the party invoking the limitations provision was a private individual; recognition of the defense in such cases would mean that, through the negligence of state agents, who might have no incentive to prosecute the State's claims (85 U.S. at 70), lands held in trust for the public could "pass into private ownership" without the State's consent (*id.*

---

[6] Rev. Stat. 1069 (1878 ed.) provided in pertinent part:

> Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years of after the claim first accrues * * *.

at 69). That is not the case when a state disputes the right of the United States to an interest in land. As the Court pointed out in *United States* v. *California*, *supra*, 332 U.S. at 40, the United States "holds its interests * * * in trust for all the people." [7]

Finally, the court of appeals turns on its head the settled rule for construing conditional waivers of sovereign immunity when it suggests (App., *infra*, 6a) that the *absence* of any reference to the States in the comments on Section 2409a(f) in the House Report (H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 3, 5 (1972)) reveals a congressional intent to exclude the States from the reach of that limitations provision. The strict construction rule would ordinarily require that the literal terms of a limitations provision be given effect regardless of what comments may be found in the legislative history. Certainly, a court should not be free to refuse to give effect to the unambiguous language of a provision conditioning a waiver of sovereign immunity simply because it can find no statements in congressional reports affirming that the provision means what it says. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). The reliance on congressional silence is particularly troubling in this case, in view of the fact that the court did not conclude that the absence of any reference to the States in other sections of the House Report warranted excluding the

---

[7] *Guaranty Trust Co.* v. *United States*, *supra*, is another case invoked by the court of appeals that contains language running counter to the court's analysis. In *Guaranty Trust*, the Court held that a foreign sovereign could not invoke the protection of a statute of limitations when suing in a state or federal court. The Court concluded (304 U.S. at 136; emphasis added) that the "public interest *of the forum*" that is recognized in the *nullum tempus* rule, which protects a domestic sovereign against the loss of public rights or property through the negligence of its officers, does not go so far as to protect the rights of foreign governments. But the forum in this case is a federal court, through which the federal government has afforded a remedy when certain conditions are met; and that forum does not favor the interests of a plaintiff state over the federal interest in strict observance of the conditions attached to a waiver of the immunity of the United States.

States from the benefits of the waiver of sovereign immunity in the Quiet Title Act. [8]

2. As indicated in Point 1, *supra*, the court of appeals' opinion conflicts with decisions of this Court respecting the rule of strict construction of waivers of sovereign immunity and with *United States* v. *Louisiana*, *supra*, and cases from the Ninth Circuit and the Court of Claims, in which a general statute of limitations provision was applied to a state's claim.

---

[8] The only ground of jurisdiction recognized by the district court was 28 U.S.C. 2409a (App., *infra*, 14a-16a), and the court of appeals properly did not disturb this conclusion (*id.* at 9a). (It would be more accurate, however, to say that the district court's jurisdiction is predicated on 23 U.S.C. 1346(f), and that the waiver of sovereign immunity is embodied in 28 U.S.C. 2409a.)

The alternate grounds of jurisdiction suggested by the State (see page 3, *surpa*) did not include a waiver of sovereign immunity covering the subject matter of this suit, which culminated in a judgment quieting title in the State to land that the United States had claimed and over which it had exercised privileges of ownership (App., *infra*, 29a-30a). The State's contention below that Congress had waived the immunity of the United States for such a suit as this in a judicial review provision of the Administrative Procedure Act, as amended in 1976, 5 U.S.C. 702, is groundless. As that section expressly provides, it does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The House Report on the 1976 amendments to the APA makes it clear that the amended section "is not intended to permit suit in circumstances where other statutes forbid *or limit* the relief sought" and that conditions on the right to sue in statutes such as the Tucker Act therefore cannot be evaded through the device of an APA action. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 12-13 (1976). The remarks are equally applicable to the Quiet Title Act. The careful limitations on that remedy are not to be circumvented by the expedient of naming federal officers rather than the United States as defendants and requesting a declaration that the Little Missouri is "navigable for the purposes of determining ownership" (Amended Complaint, dated Mar. 11, 1980, at 4) rather than a judgment quieting title in the plaintiff. Cf. *Cory* v. *White*, No. 80-1556 (June 14, 1982), slip. op. 5-6.

The court of appeals' analysis is also completely at odds with the Ninth Circuit's decision in *Park County, Montana* v. *United States*, 626 F.2d 718 (1980), *cert. denied*, 449 U.S. 1112 (1981). In that case a county had asserted that the limitations provision in the Quiet Title Act did not apply to it because it was a unit of state government, clothed with the State's sovereign immunity. The Ninth Circuit rejected the argument, holding that 28 U.S.C. 2409a(f) applies to governmental entities as well as to individuals. It explained (626 F.2d at 720):

> The district court concluded that it had no power to engraft exceptions for any reason to the language of 28 U.S.C. 2409a(f) and that the 12-year statute of limitations should be strictly construed. * * *.
>
> Furthermore, * * * we find the cases cited by appellants to be inapplicable because they are based primarily in common law doctrines of sovereignty and state court decisions interpreting the extent of this sovereignty. Unlike those cases, this case involves a federal statute of limitations in a suit against the United States in federal forum. Such statutes of limitation are generally applicable to governmental entities as well as individuals. See *United States* v. *Louisiana*, 127 U.S. 182, 185, 192 * * * (1888); *California* v. *United States*, 132 F. Supp. 208 (Ct.Cl. 1955).

The court below found *Park County* distinguishable because it did not concern the State of Montana itself; but it is clear nonetheless from the reasoning of *Park County* that the Ninth Circuit takes a contrary view of the question decided by the court of appeals in this case.

3. The question is important. Actions by states to quiet title against the United States occur with reasonable frequency; and the fact that in this case the federal government believes it has a meritorious statute of limitations defense to assert does not make this action unique. In the past three years alone, the limitations defense has been involved in *California* v. *Arizona*, *supra.*; *Nevada* v. *United States*, 628 F.2d 1357 (9th Cir. 1980) (table), *cert. denied*, 450 U.S. 995 (1981); and in the present case. The defense has also been asserted against a state or a unit of government asserting a state's immunity in

pending actions in *Utah* v. *United States*, Civil No. C-79-0302J (D. Utah, filed May 22, 1979); *Papasan, Superintendent of Board of Education* v. *United States*, Civil No. 81-90 (N.D. Miss., filed June 12, 1981); (school board invoking State's immunity) and *California ex rel. State Lands Commission* v. *United States*, 512 F. Supp. 36 (N.D. Cal. 1981). [9] The question of the applicability of Section 2409a(f) has also been raised by Guam and Puerto Rico. *Commonwealth of Puerto Rico* v. *United States*, Civil No. 80-2079-C.C. (D.P.R., filed Sept. 24, 1980); *Government of Guam* v. *United States*, Civil No. 82-0001 (D. Guam, filed Jan. 6, 1982).

In addition, the application of limitations provisions in other statutes that do not expressly mention the States could also be affected. Although the court of appeals sought to restrict its holding to suits by states respecting title to public trust lands, the court's analysis is not clearly so limited. The *nullum tempus* rule invoked by the court would seem to apply to any limitations provision that speaks in general terms.

Finally, both the federal government and the States have an interest in obtaining a final resolution of the question whether the United States may raise the statute of limitations defense in 28 U.S.C. 2409a(f) in "[a]ny civil action" brought under the Quiet Title Act by a state. A uniform application of the statute throughout the nation is essential, since there is no justification for leaving states in one section of the country free to litigate old claims against the United States when sister states elsewhere do not have the same privilege. Of course, land disputes between the federal government and the States can be resolved by means other than litigation—legislation, agreements on land uses, and informal measures may be employed. The state of uncertainty regarding litigation of old claims produced by the decision below can only complicate the resolution of such controversies.

[9] In *California ex rel. State Lands Commission*, the district court issued an interlocutory decision barring the United States from raising the defense; its decision was cited, and in large part followed, by the court of appeals in this case. The action is still pending in the district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

JUNE 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 81-1441 and 81-1486

No. 81-1441

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellee,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Appellants.

Appeal From The United States District Court For The District of North Dakota

---

No. 81-1486

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellant,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Appellees.

Appeal From The United States District Court For The District of North Dakota

Submitted: December 14, 1981
Filed: February 12, 1982

Before:

GIBSON, Senior Circuit Judge, BRIGHT, Circuit Judge, and LARSON,* Senior District Judge.

LARSON, Senior District Judge.

The Secretary of the Interior, et al., appeal from the judgment of the district court, *State of North Dakota, ex rel. Board of University and School Lands* v. *Andrus*, 506 F. Supp. 619 (D.N.D. 1981),[1] holding that the Little Missouri River in North Dakota was navigable in fact on the date of North Dakota's statehood, and hence that title to the bed of the stream originally vested with the State of North Dakota under the equal footing doctrine and the Submerged Lands Act, § 3, 43 U.S.C. § 1311 (1976). We affirm.

The Little Missouri River has its source in the northeastern corner of Wyoming. It flows northward through the southeast corner of Montana, the northwest corner of South Dakota, and the badlands of western North Dakota. It joins the Missouri River in west central North Dakota. The Board of University and School Lands of the State of North Dakota commenced this suit on October 31, 1978, to prevent the federal government from issuing oil and gas leases on the bed of the Little Missouri River in North Dakota. The federal government has issued such leases since at least 1955.

The parties agree that the State of North Dakota was originally vested with title to land under waters that were

---

*Earl R. Larson, Senior District Judge, District of Minnesota, sitting by designation.

[1]The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota.

navigable on October 1, 1889, the date of statehood. [2] At a one day trial the State presented documentary evidence on the historical and current status of the waterway. There was evidence of canoe travel prior to statehood, an effort to float logs down the river shortly after North Dakota became a state, present-day recreational canoe traffic, and other small craft usage over the years. The evidence suggested that the possibility of travel in both historical and contemporary times has depended on the water level and the season of the year, and that some sections have been extremely difficult to negotiate due to rapids and other obstructions. The federal government did not present any evidence on navigability; the Department of Justice only presented evidence on notice for statute of limitations purposes. The district court found that it was entitled to hear the matter as a quiet title action under 28 U.S.C. § 2409a (1976), that the twelve year statute of limitations in section 2409a(f) did not bar the suit even though the United States claimed that the State knew of the federal leases as early as 1955, and that there was sufficient evidence to find that the river was navigable as of statehood. [3]

The federal government appeals, arguing that the statute of limitations in section 2409a(f) applies in this action and that, at any rate, the State's evidence demonstrates that the Little Missouri was not navigable. The State cross appeals, maintaining that even if the appellate court finds that the statute of limitations precludes suit under section 2409a, the district court erred in ruling that there was no jurisdiction under the federal question provision, 28 U.S.C. § 1331 (1976), for the State's original complaint. Rather than requesting the court to

---

[2] The federal government's assertion of title is based on its status as a riparian landowner.

[3] The Three Affiliated Tribes were not represented in the litigation. Recognizing the interest of the Tribes in the bed of the river within and bordering the Fort Berthold Reservation, the district court states that any orders shall have no effect on the bed of the Little Missouri River below the west line of Lot 10, Section 34, Township 148 North, Range 95 West.

quiet title, the State originally asked for a declaration that the river is navigable and an Order for the defendants to cease developing the bed of the river. The State of California, through its State Lands Commission, has submitted an amicus curiae brief in these appeals opposing the position of the federal government and supporting the State of North Dakota.

Statute of Limitations

Congress waived sovereign immunity for quiet title actions in section 2409a. This statute provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. 28 U.S.C. § 2409a(a). [4]

A statute of limitations for action under section 2409a is found in 28 U.S.C. § 2409a(f):

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

The federal government argues that this statute of limitations bars the instant action, while the district court found and the State argues that section 2409a(f) does not apply to a claim by a sovereign to public trust lands.

Under the rule *quod nullum tempus occurrit regi* the defenses of statute of limitations and laches cannot be asserted against a sovereign. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938). Although this rule developed in England as a royal prerogative, it is supported in modern law by the policy judgment that the public should not suffer because of the negligence of its officers and agents. *Id.* A statute of limita-

---

[4] Under 28 U.S.C. § 1346(f) (1976), the district courts have original jurisdiction over actions brought pursuant to 28 U.S.C. § 2409a (1976).

tions will only apply to a sovereign when the statute expressly designates the sovereign or when the sovereign must necessarily be subject to the statute as determined by legislative intent. *See, e.g., id.* at 133; *Weber* v. *Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 70 (1873).

In the present suit North Dakota is asserting title to lands which would be public trust lands if held by the State. [5] Public trust lands are held in trust for the citizens of a state and they are distinguished from lands which the State holds in a proprietary capacity. Title to public trust lands is a basic attribute of state sovereignty. *See, e.g., United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Shively* v. *Bowlby*, 152 U.S. 1, 49 (1894). Rather than arising under congressional grant, title to public trust lands is vested in the states by the Constitution. *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The alleged public trust character of the lands that are the subject of this suit has special implications for the applicability of the section 2409a(f) statute of limitations. In *Weber* v. *Board of Harbor Comm'rs* the Supreme Court addressed the issue of title to submerged public trust lands. In the course of its discussion the Court noted: "[s]tatutes of limitation are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." 85 U.S. at 70. Also of significance here is the more recent case of *United States* v. *California*, 332 U.S. 19 (1947), in which the Court held that laches, estoppel, and adverse possession did not preclude the United States from asserting title to submerged public trust lands. *Id.* at 39-40. The Court went on to hold that the federal government had title in certain submerged tidelands. *Id.* at 41. Although Congress effectively overruled the Court in its adoption of the Submerged Lands

---

[5] The Supreme Court of North Dakota has held that State lands beneath navigable waters are held in trust for the public. *United Plainsmen Assoc.* v. *North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976).

Act, 43 U.S.C. §§ 1301, *et seq.*, the principle that equitable defenses do not bar a sovereign from asserting its title to public trust lands applies just as strongly to the State of North Dakota in the present dispute as it did to the United States in *United States* v. *California*.

The statute of limitations in section 2409a(f) does not expressly mention actions by states, nor does the legislative history provide any support whatsoever for the proposition that Congress intended section 2409a(f) to apply to actions such as the case at bar. The House Report for section 2409a(f) refers to "persons," "citizens," and "individual citizens," [6] but nowhere does it mention "states." [7] H.R. Rep. No. 92-1559, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4547, 4547-52. In addressing the liability of states for civil rights violations under 42 U.S.C. § 1983 (1976) to states, the Supreme Court noted the absence of reference to states in the legislative history and said: "[w]e can only conclude that this silence on the matter is itself a significant indication of the legislative intent." *Quern* v. *Jordan*, 440 U.S. 332, 343 (1979).

---

[6] In a different although still relevant situation the Supreme Court stated:

> "[I]n common usage, the term 'person' does not include the sovereign [and] statutes employing the phrase are ordinarily construed to exclude it. ". . . Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

[7] At one point the House Report says of the statute of limitations that "the period is fixed in this manner so that the Government will not have to defend against *state* claims." H.R. Rep. No. 92-1559, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4547, 4550 (emphasis added). It is apparent from the context, however, that this was a typographical error and that the word "*state*" should have appeared rather than "*stat.*." The court in *Hatter* v. *United States*, 402 F. Supp. 1192 (E.D. Cal. 1975) has also recognized that this was a typographical error and that the proper word was "stale." *See id.* at 1194.

It might be argued in response that even if the legislative history does not explicitly mention states, the general purpose of the statute of limitations in barring stale claims would not be served if states are exempted. In light of the relatively recent adoption of the Submerged Lands Act in 1953, however, it is difficult to argue that Congress would consider a claim by a state to public trust lands stale. The effect of the Submerged Lands Act was to reaffirm the title of the states to lands beneath navigable waters at statehood. *State of California ex rel. State Lands Comm'n* v. *United States*, 512 F. Supp. 36, 39-40 (N.D. Cal. 1981). Insofar as the impetus of the enactment of the quiet title statute in section 2409a was a dispute between private landowners, *California* v. *Arizona*, 440 U.S. 59, 67 n.7 (1979), it is further apparent that the concern of Congress in enacting the section 2409a(f) statute of limitations was with the stale claims of private landowners, not states.

The federal government's primary argument for the application of section 2409a(f) to states is that the statute refers to "[a]*ny* civil action" (emphasis added), and that this language must necessarily include actions by states. The federal government also notes that the United States has *consented* to be sued under section 2409a, and cites the principle that any restrictions which a sovereign places on its consent to be sued, such as a statute of limitations, must be strictly construed. *See, e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

As the court in *State of California ex rel. State Lands Comm'n* v. *United States*, 512 F. Supp. at 36, aptly noted, the issue here is "a conflict between sovereign immunity doctrines." On the one hand there is the principle that a sovereign (North Dakota) should not be subject to equitable defenses such as a statute of limitations unless expressly included. On the other hand there is the principle that the consent of a sovereign (the United States) to waive sovereign immunity should be strictly construed. The court in *State of California ex rel. State Lands Comm'n* v. *United States* resolved this conflict for the state. *Id.* We believe that this is appropriate in the

present case as well because the interest of the people of the State of North Dakota in quieting title to public trust lands is great and because the United States Congress has the option of adding an express reference to states in section 2409a(f) if it wishes the statute of limitations to apply to actions such as the present one. [8]

The federal government has cited a number of decisions in the present case which it claims provide support for applying the statute of limitations. *See Nevada* v. *United States*, No. 78-1185 (9th Cir. Sept. 18, 1980), *cert. denied*, 101 S. Ct. 1695 (1981); *Park County, Montana* v. *United States*, 626 F.2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Hart* v. *United States*, 585 F.2d 1280 (5th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). In our view these three cases are all dis-

---

[8] The court in *State of California ex rel. State Lands Commission* v. *United States*, 512 F. Supp. 36, 45 (N.D. Cal. 1981), suggested that there would be a problem under the Tenth Amendment to the United States Constitution if the statute of limitations were applied to the states "because the federal government would be infringing upon an important sovereign characteristic of the state, that characteristic being that as part of its sovereignty the state holds certain lands in trust for the use and benefit of its citizens. A statute of limitations enacted by Congress should not be applied where it would deprive a state of public trust land." In the present case the State of North Dakota offered a similar argument, but the district court ruled that "since the matter is resolvable without reaching the constitutional issue, that claim is not here discussed." 506 F. Supp. at 626. We are also of the opinion that it is not necessary to reach the Tenth Amendment claim and that this matter would be better taken up at a later time when it has been more thoroughly briefed. We note in dictum, however, that the argument for a constitutional prohibition on the application of a statute of limitations to actions by states under 28 U.S.C. § 2409a (1976) seems problematic to us. As we have said above, by enacting section 2409a the United States voluntarily waived its sovereign immunity from suit. We are not convinced that there can be a constitutional objection to the federal government's placement of a limit on the extent to which it will give up its immunity.

tinguishable or otherwise defective as authority. Briefly, *State of Nevada* has the status of a "Memorandum" and it has not been published. Under Rule 21(c) of the United States Court of Appeals for the Ninth Circuit "[a] disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Moreover, Rule 8(i) of this Court provides:

> No party may cite an opinion that was not intended for publication by this or any federal or state court, except when the cases are related by virtue of an identity between the parties or the causes of action.

Thus, *State of Nevada* is without precedential value in this Court. Even if the decision could be cited as authority, it is apparent that the applicability of section 2409a(f) to an action by a state was not really litigated because the court said that the state did not contest this point. *See* slip op. at 2. *Park County, Montana* is distinguished in that it was brought by a county, not a state. A county is the mere creature of a state and does not have the same status as a sovereign. Further, the court did not consider the public trust lands concept. The public plaintiff in *Hart* was a city, and thus this case is distinguished on similar grounds.

In sum, we find that there is a basis both in policy and precedent for affirming the district court in its finding that the statute of limitations in section 2409a(f) does not apply to an action by a state to quiet title to public trust lands. Because we find that the statute of limitations is inapplicable in the present case, we need not address the federal government's argument that the State received notice within the limitation period, nor need we consider the State's cross appeal arguing that an alternative basis for jurisdiction can be premised upon 28 U.S.C. § 1331.

Navigability

If the Little Missouri was navigable upon the date of North Dakota's admission to the union, then title to the bed of the waterway vested in the State at that time. In *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842), the Supreme Court held that after the American Revolution title beneath navigable waters passed to the original 13 states. In *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845), the Court held that under the equal footing doctrine subsequently admitted states have the same rights to lands beneath navigable waters. *Accord*, *Shively* v. *Bowlby*, 152 U.S. at 26. the equal footing doctrine provides that states admitted after the first 13 have the same rights of sovereignty, jurisdiction, and absolute title over sovereign lands as their predecessors. As noted above, Congress reaffirmed original title of the states to lands beneath navigable waters in the Submerged Lands Act, 42 U.S.C. § 1311. The Supreme Court has recently applied this principle in *Montana* v. *United States*, 450 U.S. 544, 551 (1981), and *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. at 374.

The legal standards on navigability have developed over a long line of cases. In *The Daniel Hall*, 77 U.S. (10 Wall.) 557, 563 (1870), the Supreme Court set forth what has become the basic standard:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874), the Court elaborated, stating that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor on the difficulties attending navigation." The Court also stated that "[i]t would be a narrow rule to hold that in this country, unless a river was capable of being

navigated by steam or sail vessels, it could not be treated as a public highway." *Id.* The Court cautioned, however, that:

> It is not . . . "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." *Id.* at 442.

The focus on commerce does not require that the waterway be clear of obstructions or easily traveled thoughout the entire year. As the Court said in *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 122 (1921), "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasionaly natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." In *Utah* v. *United States*, 403 U.S. 9, 10, 12 (1971), a case concerned with the claim of the State of Utah to the bed of the Great Salt Lake under the equal footing doctrine, the Supreme Court cited the above quoted passage from *The Daniel Ball* and upon review of the facts concluded that the lake was navigable. As the Court said, "[t]he lake was used as a highway and that is the gist of the federal test." 403 U.S. at 11.

The district court in the present case drew upon *Utah* v. *United States* for its definition of navigability. 506 F. Supp. at 622. In support of its conclusion that the Little Missouri was navigable as of statehood, the district court recounted a number of facts from the documentary evidence introduced by the State at trial. The district court noted that in 1804 one Baptiste Le Page made a canoe journey from the Black Hills down the Little Missouri to join the Corps of Discovery. Meriweather Lewis discussed the journey with Le Page and wrote of the river after viewing its mouth:

> The Little Missouri disembogues on the S. side of the Missouri 1693 miles from the confluence of the latter with the Mississippi, it is 134 yards wide at it's mouth, and sets in with a bould current but it's greatest debth is not more than 2 1/2 feet. It's navigation is extremely difficult, owing

> to its rapidity, shoals and sand bars *it may however be navigated with small canoes a considerable distance.* This river passes through the Northern extremity of the black hills where it is very narrow and rapid and it's banks high an[d] perpendicular. it takes it's rise in a broken country West of the Black hills with the waters of the yellow stone river, and a considerable distance S.W. of the point at which it passes the black hills. 1 *Lewis and Clark Journals* 298 (Thwaites ed.). (emphasis added). [9]

The district court next noted that there was an effort to float logs down the stream just after statehood in 1881 and 1882 by one Eber H. Bly, and that the river currently carries about 200 recreational canoes per year. In a footnote, 506 F. Supp. at 623 n.6, the court also quoted a 1975 United States Corps of Engineers report which states: "[d]ue to historical and potential use, it is recommended that the Little Missouri River be classified as a navigable waterway of the United States." United States Corps of Engineers, *Little Missouri River Navigability Study* 18 (1975).

In addition to the evidence cited by the trial court, there was other documentary evidence in the record bearing on navigability. There were reports of a number of other instances of small boat usage as well as general information on water level and obstructions in the stream. Most importantly, the evidence suggested that the water level and hence the passability of the river depends on the season of the year. The water tends to be high during spring flood periods, at times quite low in the summer, and, of course, frozen during the winter.

---

[9] Clark wrote on the same day: "[o]ne of our men, Baptiste, who came down the river in a canoe, informs me that it is not navigable. He was 45 days descending." 1 *Lewis and Clark Journals* 300 (Thwaites ed.). The district court reproduced this quotation and commented: "[b]ut of course he did navigate it, and late in the fall when the river is at its very lowest." 506 F. Supp. at 619 n.23. At oral argument counsel for the State of North Dakota maintained that this quotation from Clark might best be understood in light of the fact that Lewis and Clark were traveling by keelboat. Although the stream was passable by Le Page in his canoe, counsel suggested it could not have been negotiated in a keelboat.

Although we feel that the evidence in the record concerning navigability is rather thin, we will still affirm the district court. The legal standards on navigability are liberal, and we must bear in mind that the issue is one of potential commercial use and hence navigability at the time of statehood, not in the present day. In this sense, our decision in *George* v. *Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968), is clearly distinguished. In *George*, the only use of the stream that this Court found significant was float fishing in hand propelled boats that drew from two to six inches of water. This Court ruled the stream non-navigable and hence not within admiralty jurisdiction. In *Livingston* v. *United States*, 627 F.2d 165, 169-70 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), this Court assessed *George* and noted that the test of navigability that is employed must be determined by the purpose for which navigability is being assessed, whether for admiralty jurisdiction, land claims, or for some other reason. Turning to the question of what constitutes navigability for admiralty jurisdiction, this Court said that "the concept of 'navigability' in admiralty is properly limited to describing a *present* capability of waters to sustain commercial shipping." *Id.* (emphasis added). *George* is thus distinguished from the instant case in that the standard of present-day commercial use was employed rather than the potential for commerce at a date in the distant past. Although recreational float fishing of the sort involved in *George* is certainly not commercial shipping in modern terms, canoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods.

The district court is affirmed on the appeal by Cecil Andrus and other officials of the United States as appellants (No. 81-1441), and the district court is affirmed on the appeal by the State of North Dakota (No. 81-1486).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A78-1092

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Plaintiff,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Defendants.

MEMORANDUM AND ORDER

This action is an attempt by the State of North Dakota to oust the United States of America from its proprietary claim of entitlement to control the development of oil and gas interests which lie under the bed of the Little Missouri River.

Plaintiff bases its jurisdictional claim on the Federal question statute, 28 U.S.C. § 1331. The jurisdictional issue is contested by a defense motion for summary judgment which asserts that the correct jurisdictional statute is 28 U.S.C. § 2409a. It is well established that the Federal question test must be met by the complaint, and the complaint alone. Wright, Law of Federal Courts, 3rd Ed., § 18 at p. 69.

The language of the Federal question statute is taken from Article III, Sec. 2. [1] But Federal question jurisdiction is denied

[1] In fact this type of case (i.e., state versus United States) is one wherein the Supreme Court has concurrent original jurisdiction. U.S. Const. Art. III, Sec. 2, *See also, U.S.* v. *West Virginia*, 295

where there is no showing in the complaint of a genuine federal question.

As pointed out in Wright, Law of Federal Courts, 3rd Ed. § 17, there are as many tests as there are situations. But even under the test articulated in Mishkin, The Federal Question in the District Courts, 53 *Colum. L.Rev.* 157, 165, 168 (1953) that—"there must be a substantial claim founded directly upon Federal law"—the complaint does not support the claim of a Federal question.

The gravamen of the complaint is that the U.S. is wrongfully leasing state lands. This is either an adverse claim or a trespass to be measured by state law. In Restatement (Second), Conflict of Laws, § 227 the rule is stated

> "Whether there has been a transfer of an interest in land by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the situs."

The U.S. goes on to assert that even had this action been brought under 28 U.S.C. § 2409a, it is foreclosed jurisdictionally because it falls within one of the exceptions recited in the statute. Without laboring the matter, I cannot agree with that argument. The action lies squarely under 28 U.S.C. § 2409a.

Finally, the U.S. claims that 28 U.S.C. § 2409a(f), being a statute of limitations, defeats this action. Even assuming for the moment that the limitation can override the state law as to claims of adverse possession against a state, *See, Park County Montana* v. *U.S.*, 454 F. Supp. 1 (D.C.Mont. 1978), an examination of the defense exhibits shows that specific leases and specific lands must be evaluated before any such broad application of 28 U.S.C. § 2409a(f) is permissible.

The motion for summary judgment for the plaintiff is *denied*.

The motion for summary judgment by the defendant is *denied*.

Plaintiff's complaint shall be dismissed within 20 days of the date of this order pursuant to F.R.Civ.P. 12(h)(3), unless prior

---

U.S. 463, 465 (1935); *U.S.* v. *Texas*, 339 U.S. 707 (1950); and *Utah* v. *U.S.*, 403 U.S. 9 (1971).

thereto, plaintiff shall amend its complaint to recite an adequate jurisdictional basis.

IT IS SO ORDERED.

Bismark, North Dakota, this 21 day of February, 1980.

/s/BRUCE M. VAN SICKLE, JUDGE

Bruce M. Van Sickle, Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

A78-1092

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Plaintiff,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Defendants.

MEMORANDUM AND ORDER

This is a civil action by the State of North Dakota which seeks relief from the actions of the Secretary of the Interior, the Secretary of Agriculture, the Director of the United States Bureau of Land Management, and the Chief of the United States Forest Service, who are engaged in leasing portions of the bed of the Little Missouri River for oil and gas development, and in other proprietary activities incompatible with the State's claimed ownership of the Little Missouri River Bed.

This Court has jurisdiction by virtue of 28 U.S.C. § 2409a (quiet title), and 28 U.S.C. § 1331 (federal question). The relief sought is available under 28 U.S.C. § 1361 (mandamus), and 28 U.S.C. §§ 2201 and 2202 (declaratory judgment and further relief).

The Constitutional reference to actions between a state and the United States is:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have Jurisdiction." United States Constitution, Article III, Section 2.

Chief Justice Marshall assumed that the Supreme Court's original jurisdiction was also exclusive. The statutes from 1789 to the present have proceeded on a different theory and have distinguished between situations in which the Supreme Court is given exclusive jurisdiction and those in which its jurisdiction is concurrent with that of the lower federal courts. The validity of such a division is now settled. *Charles Alan Wright*, Law of the Federal Courts, 3d Ed., p.556. Suit by a state against the United States is not permitted except in those instances where the United States has consented to be sued. *Wright*, supra, p. 558 and *Utah* v. *U.S.* (1969), 394 U.S. 89.

So in order to proceed further with this action, this Court must determine that:

a. The Supreme Court's jurisdiction in this action by a state against the United States, and testing a sovereign's entitlement to land, is not exclusive; and

b. That this is an area where the United States has consented to be sued.

The problem of exclusive jurisdiction: 28 U.S.C. § 2409a provides in part that" [sic]

> "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights."

Thus is seems clear that in actions to quiet title wherein the United States claims an interest, the Congress has empowered a district court to hear the matter. The State of North Dakota has selected this forum so there is no problem of its consent that the action be tried at this level. The Supreme Court may, of course, exercise its discretion to invoke its original

jurisdiction, [1] but until is does so there is no problem of its consent that the matter remain at the district court level.

The problem of consent to be sued: This is an instance where the United States has consented to be sued. See *Utah*, supra.

The first issue which must be resolved is the question of navigability of the Little Missouri River. As pointed out in *Livingston* v. *United States*, 627 F.2d 165 (8th Cir. 1980), "navigability" means different things under different circumstances.

But for our purposes "navigability" means navigability at the date of statehood, *Utah* v. *United States*, 403 U.S. 9 (1971). A river is a navigable river when it is used or susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel may be conducted in the customary modes of trade and travel on water, *Utah*, supra, p. 9.

> "The lake was used as a highway and that is the gist of the federal test." *Utah*, supra, p. 11.

The entire valley of the Little Missouri River lies within the Louisiana Purchase of 1803. The Fort Berthold Indian Reservation was carved out of the federal public domain by the Act of March 3, 1891, 26 Statutes 1032, two years after the admission of North Dakota as a state, October 1, 1889.

The Three Affiliated Tribes have such an interest in this litigation that resolution of the claims to any portion of the bed of the Little Missouri River which lies wholly within the Fort Berthold Reservation can only be effective if the Three Affiliated Tribes are before the Court. The area of interest to the Three Affiliated Tribes is that portion of the river bed downstream from the west line of Section 31, Township 147 North, Range 92 West of the 5th Principal Meridian, Dunn County, North Dakota, to the mouth of the Little Missouri River. The

---

[1] The Supreme Court's usual exercise of jurisdiction is through certiorari. Rule 19 of the Supreme Court Rules includes, among other grounds for certiorari, that it may be granted when the Court of Appeals has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings.

Three Affiliated Tribes also have an interest in this litigation insofar as it may involve the bed of the stream along the southerly border of the Fort Berthold Reservation from a point on the west line of Lot 10 of Section 34, Township 148 North, Range 95 West of the Principal Meridian, to the aforementioned point on the west line of Section 31.

Therefore, any orders in this matter shall not be concerned with the bed of the Little Missouri River below the west line of Lot 10, Section 34, Township 148 North, Range 95 West.

The River's history of navigability and use for trade and travel predates the identification of the river by the Corps of Discovery.

Baptiste Le Page, a French Canadian, who had been in the Cote Noir (Black Hills) with the Cheyennes, came downstream on the Little Missouri to the Mandan Village on the Big Missouri at the mouth of the Knife River, near where the Corps of Discovery had built its winter quarters (Fort Mandan). On November 3, 1804 he was "signed on" with the Corps of Discovery. [2] And it is important to note that the Little Missouri River was the most convenient downstream route from the area of Devils Tower, northwest of the Black Hills to the Knife River settlement of Mandans, and as such was clearly an established channel of commerce between those two centers. Meriweather Lewis viewed the mouth of the river after discussing it with Le Page, and commented:

> "The Little Missouri disembogues on the S. side of the Missouri 1693 miles from the confluence of the latter with the Misssissippi, it is 134 yeards wide at it's mouth, and sets in with a bould current but it's greatest debth is not more than 2½ feet. it's navigation is extremely difficult, owing to its rapidity, shoals and sand bars it may however be navigated with small canoes a considerable distance. this river passes through the Northern extremity of the black hills where it is very narrow and rapid and it's banks high an(d) perpendicular. it takes it's rise in a broken country West of the Black hills with the waters of the

---

[2] Lewis and Clark Journals, Thwaites, Vol. 1, p. 216.

> yellow stone river, and a considerable distance S.W. of the point at which it passes the black hills." [3]

The river continued navigable into the turn of the century, witness the logging operation of Eber H. Bly, 1881 and 1882. [4] Finally, the river presently carries approximately 200 canoes each year. The trip usually runs from Medora to the Lost Bridge, where it terminates in the waters of Lake Sakakawea. However the trips can easily originate as far upstream as the Devils Tower. [5]

Thus I conclude that the Little Missouri River was navigable in fact on October 1, 1889, and continues to be navigable to this date. [6]

Since the Little Missouri River is a navigable stream, title to the bed of that stream is originally vested in the State of North Dakota.

The "Shively Doctrine" as articulated in *Shively* v. *Bowlby*, 152 U.S. 1, at 26-31 (1894) is that: There is a presumption that

---

[3] Journals, supra, Vol. 1, p. 298. Clark in his journal entry for the same day says:

> "One of our men, Baptiest, who came down this river in a canoe, informs me that it is not navigable. He was 45 days descending." Journals, supra, Vol. 1, p. 300.

But of course he did navigate it, and late in the fall when the river is at its very lowest.

[4] Bismarck Tribune, June 14, 1882. Bly contracted to cut rail ties near Marmarth, North Dakota, south and upstream from the Northern Pacific crossing at the town of Little Missouri (near Medora). He went bankrupt but he floated down the logs.

[5] See letter of Chief Ranger, September 17, 1980.

[6] In the evidence is a report entitled "Little Missouri River Navigability Study," prepared for the United States Corps of Engineers and dated June 20, 1975, wherein the researchers conclude at page 18 that:

> "Due to historical and potential use, it is recommended that the Little Missouri River be classified as a navigable waterway of the United States." (Exhibit 1)

lands underlying navigable waters pass to the state upon its admission into the Union because of the Constitutional doctrine of equal footing. This doctrine rises not from an express Constitutional provision, but from the interpretation of the Constitution by the Supreme Court, that this country is a union of political equals. *Case* v. *Toftus*, 39 F. 730, p. 732 (CCD Oregon 1889). The Shively Doctrine is also explained as consistent with enabling legislation which provides for admission of the state "on an equal footing with the original states." See *United States* v. *Texas*, 339 U.S. (1950), where the equal footing principle worked to the disadvantage of Texas. In the Enabling Act which provided for the statehood of North Dakota, the "equal footing" language reads:

> "(North Dakota) . . . shall be deemed admitted by congress into the union on an equal footing with the original states." The Enabling Act, Chapter 180, 25 U.S. Statutes at Large, 676 Sec. 7.

The original states of the Union, by virtue of the revolution and their sovereignty, succeeded to the English Crown's title and dominion to the land underlying navigable waters. Thus it was held that:

> ". . . to deny to the states admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States, but reserved them to themselves." *United States* v. *Texas*, supra, p. 716.

In fact, once the factual issue of navigability is determined, North Dakota's entitlement to the riverbed is confirmed by the clear mandate of Congress found in 43 U.S.C. §§ 1301, 1303, 1311-1315 (Submerged Lands Act). Section 1311(a) reads:

> "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be,

> and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors, in interest thereof; . . ." 43 U.S.C. § 1311a. [7]

While the United States refuses to concede that the Little Missouri River is navigable, despite the recommendation of its researchers that it be recognized to be navigable, it also claims that North Dakota cannot prevail in this case:

1. Because the United States has acquired title to the bed of the stream by adverse possession; [8] and
2. In any event, under 28 U.S.C. § 2409a(f), a statute of limitations has run against North Dakota.

The United States bases it claim of adverse possession on a history of oil and gas leasing, an apparent outgrowth of the leasing of national park lands, hay lands, and forest lands along the Little Missouri River.

But Section 164 of the Constitution of North Dakota provides that:

> "No claim for the occupation, cultivation, or improvement of any public lands shall ever be recognized."

The public lands here involved are more than privately held by the state as proprietor; they are in fact held in trust for the people of North Dakota.

North Dakota has recognized that it holds these lands under the Public Trust Doctrine. *United Plainsman* v. *North Dakota State Water Commission*, 247 NW2d 457. And the lands so

---

[7] The "sovereignty analysis" relies heavily on an outstanding note by Rebecca S. Thiem in Vol 55, No. 3, NDLR, p. 455, et seq.

[8] The law of proof of open notorious and adverse possession through use of recorded instruments requires careful consideration of the scope, extent, continuity, and terms of the adverse possession evidenced by those instruments. This type of information was not furnished.

acquired, and so held, are held by the state in its sovereign capacity. The United States Supreme Court said in *Pollard's Lessee* v. *Hagen, et al.*, 44 U.S. 212 (1845):

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.
>
> * * *
>
> By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters and the shores under them, were not granted by the Constitution of the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over the subject as the original states."

Pollard's Lessee, supra, p. 230.

The doctrine of *Pollard's Lessee* was reaffirmed as late as 1977 in *Oregon Ex Rel. State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977), where the Supreme Court said:

> "(U)nder *Pollard's Lessee*, the State's title to lands underlying navigable waters within its boundaries is conferred *not by Congress but by the Constitution itself*. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the *title thus acquired by the State is absolute so far as any federal principle of land titles is concerned*. For example, in *Weber* v. *Harbor Comm'rs*, 18 Wall., at 65-66, 21 L.Ed. 798, the Court reaffirmed the doctrine of *Pollard's Lessee:*
>
> Upon the admission of California into the Union upon equal footing with the original States, *absolute property in*, and *dominion over*, all soils under the *tidewaters* within her limits passed to the State, with the con-

> sequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters. . . ."

(Emphasis supplied.)

These lands being held by the State of North Dakota in its sovereign capacity, and as trustee for the people of North Dakota, the provisions of Section 164, Constitution of North Dakota, simply confirm the rule that North Dakota can never abdicate its trust obligation. *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387 (1892).

Neither doctrines of laches, nor statutes of limitation of actions can be allowed to defeat the state's sovereign title to trust lands.

In *Carr* v. *Moore*, 93 NW2d 52 (54-55), the rule was succinctly stated:

> "Whether the title to the bed remained in the United States or passed to the State, no adverse possession thereof would be effectual, for the statute of limitations does not run as against the sovereign."

28 U.S.C. § 2409a(f) provides:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it is accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

The legislative history of the statute shows that Congress intended it to apply exclusively to persons, be they private citizens or private or public corporations. See 1972 U.S. Code Cong. & Admin. News 4547-4557. In all of the cases cited by defendant not one concerned, as in this case, an effort to defeat

a claim by a sovereign to trust lands held in its sovereign capacity. [9]

Justice Story said, in an action in debt against sureties of one, Reed, tax collector, who claimed laches as a defense:

> "The general principle is, that *laches* is not imputable to the government; . . . not in the notion of extraordinary preogatives, but upon a great public policy." *U.S.* v. *Kirkpatrick, and others*, 22 U.S. (Wheaton 9) 720, 735 (1824).

In Guaranty Trust Co. v. United States, 204 [sic] U.S. 126, Justice Stone said:

> "The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. (cases cited)
>
> But whether or not that alone counts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. Compare Maine, Ancient Law (10th Ed., 1930) 32 et seq. "The true reason is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, and equally applicable to all governments." (cases cited)."

---

[9] This Court has just had the privilege of reviewing *State of California ex rel. State Lands Commission* v. *United States of America*, United States District Court, Northern District of California, No. C 79-1865 RPA, filed January 6, 1981. It is the only case which this Court has found that has met the issue of the sovereign's capacity to protect its trust lands.

But see *Park County, Montana* v. *United States*, 626 F.2d 718 (9th Cir. 1980), (contra).

This rule the United States has applied to its benefit in resolving claims of title to submerged lands. In *United States* v. *California*, 332 U.S. 19, 40 (1947), the Supreme Court held:

> "The Government (the United States) which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

Finally, to allow the administrative officers of the United States to prevail in their effort to claim these lands is directly contrary to and in defiance of the expressed will of the Congress, as found in 43 U.S.C. § 1311(a), quoted earlier in this memorandum.

And as shown by the legislative history of the Submerged Lands Act, as found in 1953 U.S. Code Cong. and Adm. News, [C]ommencing at page 1385, a purpose of the Act was to turn the matter of issuing oil and gas leases to the beds of navigable waters over to the state once and for all.

And 28 U.S.C. § 2409a(d) mandates that if the United States disclaims an interest in real property (for example, the [dis]-claimer contained in 43 U.S.C. § 1311(b)(1), no decision in the district court can find against that disclaimer.

Plaintiffs have raised a Tenth Amendment claim. But since the matter is resolvable without reaching the constitutional issue, that claim is not here discussed.

For the reasons stated and to the extent therein indicated, I conclude that the plaintiff is entitled to the relief sought. Counsel for the State of North Dakota will forthwith prepare and

submit an appropriate form of judgment in conformity herewith.

IT IS SO ORDERED.

Fargo, North Dakota, this 3 day of February, 1981.

BY THE COURT:

/s/ BRUCE M. VAN SICKLE, JUDGE
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

Civil No. A78-1092

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Plaintiff,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. McGUIRE, Chief of the
United States Forest Service,
Defendants.

FILED
FEB 24 1981
Cletus J. Schmidt, Clerk
U.S. District Court-North Dakota

JUDGMENT

In accordance with the Memorandum and Order of the Court entered February 4, 1981, IT IS HEREBY ADJUDGED AND DECREED:

(1) The Little Missouri River is declared to be a navigable river for the purpose of determining ownership of the bed thereof.

(2) Title to the bed of the Little Missouri River within the State of North Dakota, excluding that portion lying

below the west line of Lot 10 of Section 34, Township 148 North, Range 95 West of the Fifth Principal Meridian, Dunn County, is hereby quieted in the State of North Dakota.

(3) The United States is directed to cease and desist from further developing or otherwise exercising privileges of ownership upon the bed of the Little Missouri River lying within the State of North Dakota.

/s/ BRUCE M. VAN SICKLE, JUDGE
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

Nos. 81-1441 and 81-1486

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellee/Cross-Appellant,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Appellants/Cross-Appellees.

This appeal from the United States District Court for the ____ District of North Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 12, 1982

Let the within Mandate be filed and entered on the Clerk's records.

Dated April 24, 1982

/s/ BRUCE M. VAN SICKLE, JUDGE
Bruce M. Van Sickle,
Judge, U. S. District Court

A true Copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit
4/21/82

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

Nos. 81-1441 and 81-1486

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellee/Cross-Appellant,

v.

CECIL ANDRUS, etc., *et al.*,
Appellants/Cross-Appellees.

Appeals From The United States District Court For The District Of Minnesota.

The Court, having considered appellants-cross/appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

March 15, 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 379827 1002

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2337

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

JOINT APPENDIX

REX E. LEE
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217

OWEN L. ANDERSON
Special Assistant Attorney General
University of North Dakota
Grand Forks, N. Dak. 58202
(701) 777-2961

Petition for writ of certiorari filed June 22, 1982
Certiorari granted October 4, 1982

INDEX

Relevant docket entries in the district court	1
Relevant docket entries in the court of appeals	5
Complaint filed October 31, 1978 (exhibits are omitted)	6
Answer filed February 20, 1979	10
Amended complaint filed March 12, 1980	13
Answer to amended complaint filed May 13, 1980	17
Order allowing certiorari	20

RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

DATE	NR.	PROCEEDINGS
Oct. 31	1	COMPLAINT FOR INJUNCTIVE AND MANDATORY RELIEF AND DECLARATORY JUDGMENT, with attached AFFIDAVIT OF OWEN L. ANDERSON and Exhibits A thru P, Filed.
1979		
Feb. 20	6	ANSWER OF THE DEFENDANT, UNITED STATES OF AMERICA, w/attached Certificate of Service By Mail, Filed.
July 10	7	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, Filed; with attached BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, Filed; AFFIDAVIT OF OWEN L. ANDERSON, Filed; AFFIDAVIT OF FRANK E. VYZRALEK, Filed; AFFIDAVIT OF LARRY REMELE, Filed; AFFIDAVIT OF VERNON FAHY, Filed; APPENDIX 1 through 5, AFFIDAVIT OF JUNE THOMPSON, Filed; AFFIDAVIT OF BILL DIXON, Filed; EXHIBITS "A" through "P", filed (Proposed Order submitted therewith).
Oct. 11	9	(DEFTS' CROSS) MOTION FOR SUMMARY JUDGMENT, Filed; with attached MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT MOTION, Filed; CERTIFICATE OF SERVICE BY MAIL, Filed. (Exhibits "A" through "H" attached thereto).
Oct. 30	13	BRIEF IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, with attached CERTIFICATE OF SERVICE, and Appendices A, B, and C, Filed.
Nov. 20	14	CLERK'S RECORD OF STATUS CONFERENCE—Counsel advise Court that case can be submitted on Affidavit and briefing schedule ordered by the Court. Case to be at issue for Court's determination by 2-5-80. Recess.
	15	ORDER After Pre-Trial, Filed & Entered; NOTICE OF ENTRY with copy to counsel.
Dec. 6	16	(DEFENDANTS') SUPPLEMENTAL BRIEF AND AFFIDAVITS, Filed; with attached CERTIFICATE OF SERVICE BY MAIL, Filed.

DATE	NR.	PROCEEDINGS
1980		
Jan. 17	17	(PLAINTIFF'S) SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S SUPPLEMENTAL BRIEF AND AFFIDAVITS OF DECEMBER 5, 1979, Filed; with attached CERTIFICATE OF SERVICE, Filed.
Feb. 21	18	MEMORANDUM AND ORDER, Filed, denying the motion for summary judgment for the plaintiff, denying the motion for summary judgment by the defendant and dismissing Plaintiff's Complaint within 20 days unless prior thereto, plaintiff shall amend its complaint to recite an adequate jurisdictional basis; with NOTICE OF ENTRY to counsel of record.
Mar. 12	19	AMENDED COMPLAINT; with AFFIDAVIT OF SERVICE BY MAIL.
Apr. 21	20	MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE, Filed; with MEMORANDUM IN SUPPORT THEREOF, Filed; with CERTIFICATE OF SERVICE BY MAIL, Filed.
Apr. 30	21	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE, Filed; with AFFIDAVIT OF SERVICE BY MAIL, Filed.
May 7	22	ORDER, Filed and Entered that Motion to Dismiss or in the Alternative Motion to Strike is Denied.
May 13	23	ANSWERS OF THE DEFENDANT, UNITED STATES OF AMERICA with attached CERTIFICATE OF SERVICE BY MAIL, Filed.
July 15	24	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, Filed
	25	BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFT.'S MOTION FOR A MORE DEFINITE STATEMENT AND AFFIDAVITS AND EXHIBITS, Filed.
	26	AFFIDAVIT OF OWEN L. ANDERSON, Assistant Attorney General, State Land Dept, Filed.
	27	EXHIBITS A through Q, Filed.
	28	AFFIDAVIT OF SERVICE BY MAIL, Filed.
July 24	29	DEFENDANT'S BRIEF IN REPLY TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, with CERTIFICATE OF SERVICE BY MAIL, Filed.

DATE	NR.	PROCEEDINGS
Aug. 14	30	PLAINTIFF's RESPONSE TO DEFENDANTS' BRIEF IN REPLY TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, with AFFIDAVIT OF SERVICE BY MAIL, Filed.
Oct. 15	31	ORDER, Filed & Entered; denying motion for summary judgment. (case set as first case on 12/15/80). NOTICE OF ENTRY with copy to counsel.
Nov. 20	32	CLERK'S RECORD OF PRE-TRIAL CONFERENCE—Ass't Atty. Gen. John Morrison for Ptf and Ass't U.S.A. Herb Becker for deft. Discussion re nature and timetable of case (estimated 1½ days). Recess.
	33	ORDER, Filed and Entered, that both parties will submit historical evidence, and that briefing to be completed by 12/16/80, existing briefs in file shall be treated as trial briefs. NOTICE OF ENTRY w/copy of Order to counsel.
Dec. 12	34	PLAINTIFF'S TRIAL BRIEF, Filed.
Dec. 15	35	DEFENDANTS TRIAL BRIEF, Filed.
Dec. 16	36	STIPULATION, Filed, that all objections to foundation be waived and documents and affidavits shown as Ptf's Exhibits 1-22 shall be admitted into evidence.
	37	CLERK'S RECORD OF COURT TRIAL—Ptf. rests after Exhibits 1-22 rec'd, deft presents case and rests. Case concluded. Adjourn.
1981		
Feb. 4	34	MEMORANDUM AND ORDER, Filed & Entered; that the plaintiff is entitled to the relief sought. Counsel for the State of North Dakota will forthwith prepare and submit an appropriate form of judgment in conformity herewith. NOTICE OF ENTRY with copy to counsel.

DATE	NR.	PROCEEDINGS
Feb. 24	39	JUDGMENT, Filed & Entered; "IT IS HEREBY ADJUDGED AND DECREED: 1) The Little Missouri River is declared to be a navigable river for the purpose of determining ownership of the bed thereof. 2) Title to the bed of the Little Missouri River within the State of North Dakota, excluding that portion lying below the west line of Lot 10 of Section 34, Township 148 North, Range 95 West of the Fifth Principal Meridian, Dunn County, is hereby quieted in the State of North Dakota. 3) The United States is directed to cease and desist from further developing or otherwise exercising privileges of ownership upon the bed of the Little Missouri River lying within the State of North Dakota. NOTICE OF ENTRY, with copy to counsel.
Apr. 22	40	(DEFENDANT'S) NOTICE OF APPEAL, Filed, to the United States Court of Appeals for the Eighth Circuit from the final judgment entered on Feb. 24, 1981.
Apr. 30	48	NOTICE OF APPEAL filed that plaintiff appeals to the United States Court of Appeals for the Eighth Circuit from Court's Order dismissing plaintiff's complaint which was dated 2/21/80.

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

DATE	FILINGS—PROCEEDINGS	Filed
1981		
June 22,	FEDERAL defendants are acting as appellants.	(7)
Jul 7	*Brief Appellant*	(10)
Jul 17	THREE copies D.R., Plntf's Exh's 1-24, Def's Exh's A, B, C, F, G, I, J, K, L, ONE red notebook of exhibits, w/1486.	
Aug 10	*Brief Appellee*	(15)
Aug 31	*Brief Amicus Curiae* (Calif.)	(18)
Sep 2	*Reply brief* (brief appellee in 81-1486)	19
Dec. 14	ARGUED & SUBMITTED to Judges Bright, Gibson, Larson. Edward J. Shawaker, Justice Dept. for Govt, Owen L. Anderson for State of No.Dak. Concl. by Edward J. Shawaker. Recorded. w/1486	
1982		
Feb. 12	PUBLISHED OPINION BY JUDGE LARSON.	(20)
Feb. 12	JUDGMENT OF District Court affirmed	(21)
Feb. 22	Counsel for Cecil Andrus, et al for extension of time to file petition for rehearing with suggestion for rehearing en banc	(22)
Feb. 22	ORDER: Appellant/cross-appellee may have to and including March 8, 1982 to serve and file petition for rehearing with suggestions for rehearing en banc	(23)
Mar. 5	Appellants/cross-appellee's petition for rehearing or in the alternative rehearing en banc	(24)
Mar. 15	ORDER: APPELLANTS-cross/appellees' petition for rehearing and suggestions for rehearing en banc denied (w/1486)	(25)
Apr. 21	MANDATE ISSUED (w/1486)	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Civil Action No.
A 78-1092

THE STATE OF NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PLAINTIFF,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR; BOB BERGLAND, SECRETARY OF AGRICULTURE; FRANK GREGGS, DIRECTOR OF THE UNITED STATES BUREAU OF LAND MANAGEMENT; AND JOHN R. MCGUIRE, CHIEF OF THE UNITED STATES FOREST SERVICE, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND MANDATORY RELIEF AND DECLARATORY JUDGMENT

I. JURISDICTION AND DESCRIPTION OF THE PARTIES

1. This is a civil suit seeking injunctive, mandatory and declaratory relief from the actions of defendants in asserting ownership of the bed of the Little Missouri River within the State of North Dakota.

2. Jurisdiction is founded on 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. §§ 2201 and 2202 (Declaratory judgment and further relief) and 5 U.S.C. §§ 701–706 (A.P.A.).

3. Venue is proper under 28 U.S.C. § 1391 and the amount in controversy exceeds $10,000.00.

4. The State of North Dakota is a sovereign state with plenary authority to sue on its own behalf and that of its citizens to protect the environmental, economic and property interests of the State and its citizens, as well as to protect the natural resources of the State as trustee of those resources.

5. The Board of University and School Lands of the State of North Dakota exercises management authority over the grant lands and sovereign lands of the State of

North Dakota pursuant to the Constitution and Laws of the State of North Dakota.

6. Defendant Andrus is the Secretary of the Interior of the United States of America with final authority over the Department's activities and specifically over the Bureau of Land Management that is presently unlawfully asserting ownership over sovereign lands of the State of North Dakota.

7. Defendant Bergland is the Secretary of Agriculture of the United States of America with final authority over the Department's activities and specifically over the United States Forest Service that is presently unlawfully asserting ownership over sovereign lands of the State of North Dakota.

8. Defendant Greggs is the Director of the Bureau of Land Management.

9. Defendant McGuire is the Chief of the United States Forest Service.

II. GENERAL LEGAL AND FACTUAL BACKGROUND

10. The Little Missouri River has its headwaters in the northeastern part of Wyoming. It flows northward traversing the southeast corner of Montana, the northwest corner of South Dakota, and the badlands region of western North Dakota until it empties into the Missouri River in the west central part of North Dakota.

11. The Little Missouri River is historically and presently navigable in fact as will more fully appear in the Affidavit and Exhibits attached hereto and herein incorporated by reference; historians have documented commercial navigation on the Little Missouri River as early as 1804.

12. By an Act of Congress approved February 22, 1889, entitled, "AN ACT to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State Governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," North Dakota became a state. See, Chapter 180, 25 United States Statutes at Large 676.

13. North Dakota became a state on an equal footing with the original thirteen states and all other states admitted to the Union; upon achieving statehood North Dakota became the sovereign owner of all of the beds of navigable lakes and streams (sovereign lands) located within the state subject only to the authority of the United States under constitutional powers delegated to it by the states to guarantee the right of navigation on such bodies of water for the enhancement of interstate commerce.

14. The United States of America through its Bureau of Land Management has issued leases for the development of minerals on and underlying the bed of the navigable Little Missouri River and has otherwise unlawfully exercised other privileges of ownership of such beds. Such activities constitute an unlawful encroachment and a slander of title upon the sovereign lands of the State of North Dakota.

15. By act of the forty-fifth legislative assembly in 1977 entitled, "AN ACT ... relating to the sovereign lands of the state of North Dakota. ..." the Board of University and School Lands was given complete administrative authority over the sovereign lands of the State of North Dakota. This action is being brought by such Board in fulfillment of that responsibility. See, S.L. 1977, Ch. 144. (Chapt. 15-08.2, N.D.C.C.).

16. By act of the forty-fourth legislative assembly in 1975 entitled, "AN ACT to provide for classification of the Little Missouri River as a state scenic river, and for its protection and preservation as a free-flowing and navigable river," the Little Missouri River was deemed a navigable river; therefore, this action is consistent with legislative directive. See, S.L. 1975, Ch. 576. (Chapt. 61-29, N.D.C.C.).

17. That the Board of University and School Lands of the State of North Dakota and its predecessor in interest, the Bank of North Dakota, has leased the bed of the Little Missouri River for the exploration and production of oil and gas for more than sixteen years based on a search of records on file with the State Historical Society of North Dakota.

III. CLAIM FOR RELIEF

18. Plaintiff repeats and alleges all previous allegations as though fully set forth herein.

19. Defendant has unlawfully asserted ownership of the bed of the navigable Little Missouri River to the detriment of plaintiff.

20. That the Little Missouri River is a navigable river in fact and in law based on historical and present interstate and intrastate commercial navigation.

IV. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for this Court's order:

1. Directing defendants to cease and desist from development or otherwise exercising privileges of ownership upon the bed of the Little Missouri River within the State of North Dakota.

2. Declaring the Little Missouri River to be a navigable river for the purpose of determining ownership of the bed.

3. Granting appropriate interlocutory relief to plaintiffs as may be necessary to prevent further injury to them pending final judgment herein.

4. Granting such further relief as may be appropriate.

Dated this 31st day of October, 1978.

Respectfully submitted,

ALLEN I. OLSON
Attorney General of North Dakota

BY: _____
OWEN L. ANDERSON, *Special Assistant*
Attorney General of the Board of
University and School Lands
State Capitol Building
Bismarck, North Dakota 58505

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A78-1092

THE STATE OF NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PLAINTIFF,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR; ET AL., DEFENDANTS.

ANSWER OF THE DEFENDANT, UNITED STATES OF AMERICA

Comes now the United States of America, by and through Assistant United States Attorney Herbert A. Becker, and for its Answer to the Plaintiff's Complaint for Injunctive and Mandatory Relief and Declaratory Judgment states the following:

1.

Defendant admits paragraphs, 1, 2, 3, 4 and 5.

2.

Defendant admits that Cecil Andrus is the Secretary of the Interior and denies the remaining allegations contained in paragraph 6.

3.

Defendant admits that Bob Bergland is the Secretary of Agriculture and denies the remaining allegations contained in paragraph 7.

4.

Defendant admits paragraphs 8, 9 and 10.

5.

Defendant denies paragraph 11.

6.

Defendant admits paragraph 12.

7.

Defendant denies paragraph 13.

8.

Defendant admits that its Bureau of Land Management has issued leases for the development of minerals on or underlying the bed of the navigable Little Missouri River and denies all other allegations contained in paragraph 14.

9.

Defendant is without sufficient facts to confirm or deny paragraph 15.

10.

Defendant admits that part of paragraph 16 which quotes from the North Dakota Century Code and denies the remaining allegations of that paragraph.

11.

Defendant is without sufficient facts to confirm or deny paragraph 17.

12.

Defendant denies paragraphs 18, 19 and 20.

AFFIRMATIVE DEFENSES

The United States further answers by alleging the following affirmative defenses:

1. That this is an action in the nature of a quiet title suit.

2. That the United States has exercised dominion and control over the bed of the river since at least 1955.

3. That 28 U.S.C. 2409(a) bars this action because it was not commenced within twelve years of the date upon which it accrued.

4. That portions of the bed of the river are owned by the Three Affiliated Tribes of the Fort Berthold Indian Reser-

vation, North Dakota, and this Court does not have subject matter or personal jurisdiction over the Tribe.

THEREFORE, Defendant prays for this Court's Order dismissing this action and for costs and such other and further relief as the Court may deem appropriate.

Dated this 16th day of February, 1979.

/s/ _____

HERBERT A. BECKER
Assistant United States Attorney
P. O. Box 2505
Fargo, North Dakota 58108
Attorney for the Defendant,
United States of America.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A78-1092

THE STATE OF NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PLAINTIFF,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR; BOB BERGLAND, SECRETARY OF AGRICULTURE; FRANK GREGG, DIRECTOR OF THE UNITED STATES BUREAU OF LAND MANAGEMENT; AND R. MAX PETERSON, CHIEF OF THE UNITED STATES FOREST SERVICE, DEFENDANTS.

AMENDED COMPLAINT

I. JURISDICTION AND DESCRIPTION OF THE PARTIES

1. This is a civil suit seeking relief from the actions of defendants in asserting ownership of the bed of the Little Missouri River within the State of North Dakota.

2. Jurisdiction is founded on 28 U.S.C. § 2409a (Quiet Title); 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Mandamus); and 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgment and further relief). The action also arises under 5 U.S.C. §§ 701-706 (A.P.A.).

3. Venue is proper under 28 U.S.C. § 1391.

4. The State of North Dakota is a sovereign state with plenary authority to sue on its own behalf and that of its citizens to protect the environmental, economic and property interests of the State and its citizens, as well as to protect the natural resources of the State as trustee of those resources.

5. The Board of University and School Lands of the State of North Dakota exercises management authority over the grant lands and sovereign lands of the State of North Dakota pursuant to the Constitution and laws of the State of North Dakota.

6. Defendant Andrus is the Secretary of the Interior of the United States of America with final authority over the Department's activities and specifically over the Bureau of Land Management that is presently unlawfully asserting ownership over sovereign lands of the State of North Dakota.

7. Defendant Bergland is the Secretary of Agriculture of the United States of America with final authority over the Department's activities and specifically over the United States Forest Service that is presently unlawfully asserting ownership over sovereign lands of the State of North Dakota.

8. Defendant Gregg is the Director of the Bureau of Land Management.

9. Defendant Peterson is the Chief of the United States Forest Service.

II. GENERAL LEGAL AND FACTUAL BACKGROUND

10. The Little Missouri River has its headwaters in the north-eastern part of Wyoming. It flows northward traversing the southeast corner of Montana, the northwest corner of South Dakota, and the badlands region of western North Dakota until it empties into the Missouri River in the west central part of North Dakota.

11. The Little Missouri River is historically and presently navigable in fact as appears in the Affidavit and Exhibits attached to the complaint and incorporated herein by reference. Historians have documented commercial navigation on the Little Missouri River as early as 1804.

12. By an Act of Congress approved February 22, 1889, entitled, "AN ACT to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State Governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," North Dakota became a state. See, Chapter 180, 25 United States Statutes at Large 676.

13. North Dakota became a state on an equal footing with the original thirteen states and all other states admitted to the Union; upon achieving statehood North Dakota became the sovereign owner of all of the beds of navigable lakes and streams (sovereign lands) located within the state subject only to the authority of the United States under constitutional powers delegated to it by the states to guarantee the right of navigation on such bodies of water for the enhancement of interstate commerce.

14. The United States of America through its Bureau of Land Management has issued leases for the development of minerals on and underlying the bed of the navigable Little Missouri River and has otherwise unlawfully exercised other privileges of ownership of such beds. Such activities constitute an unlawful encroachment and a clander of title upon the sovereign lands of the State of North Dakota.

15. By act of the Forty-fifth Legislative Assembly in 1977 entitled, "AN ACT ... relating to the sovereign lands of the state of North Dakota ...." the Board of University and School Lands was given complete administrative authority over the sovereign lands of the State of North Dakota. This action is being brought by such Board in fulfillment of that responsibility. See, S.L. 1977, Ch. 144. (Chapter 15-08.2, N.D.C.C.).

16. By act of the Forty-Fourth Legislative Assembly in 1975 entitled, "AN ACT to provide for classification of the Little Missouri River as a state scenic river, and for its protection and preservation as a free-flowing and navigable river," the Little Missouri River was deemed a navigable river; therefore, this action is consistent with legislative directive. See, S.L. 1975, Ch. 576. (Chapter 61-29, N.D.C.C.).

17. That the Board of University and School Lands of the State of North Dakota and its predecessor in interest, the Bank of North Dakota, has leased the bed of the Little Missouri River for the exploration and production of oil and gas for more than sixteen years based on a search of records on file with the State Historical Society of North Dakota.

III. CLAIM FOR RELIEF

18. Defendant has unlawfully asserted ownership of the bed of the navigable Little Missouri River to the detriment of plaintiff.

19. That the Little Missouri River is a navigable river in fact and in law based on historical and present interstate and intrastate commercial navigation.

IV. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for this Court's order:

1. Directing defendants to cease and desist from development or otherwise exercising privileges of ownership upon the bed of the Little Missouri River within the State of North Dakota.

2. Declaring the Little Missouri River to be a navigable river for the purpose of determining ownership of the bed.

3. Granting appropriate interlocutory relief to plaintiffs as may be necessary to prevent further injury to them pending final judgment herein.

4. Granting such further relief as may be appropriate.

DATED this 11th day of March, 1980.

Respectfully submitted,

ALLEN I. OLSON
Attorney General of North Dakota

By: _____

MURRAY G. SAGSVEEN
Solicitor
Office of the Attorney General
First Floor, State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

_____

OWEN L. ANDERSON
Assistant Attorney General
Board of University and School Lands
State Capitol Building
Bismarck, North Dakota 58505

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A78-1092

THE STATE OF NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PLAINTIFF,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS.

ANSWER OF THE DEFENDANT, UNITED STATES OF AMERICA

Comes now the United States of America, by and through Assistant United States Attorney Herbert A. Becker, and for its Answer to the Plaintiff's Amended Complaint states the following:

1.

Defendant admits paragraphs 1, 2, 3, 4 and 5.

2.

Defendant admits that Cecil Andrus is the Secretary of the Interior and denies the remaining allegations contained in paragraph 6.

3.

Defendant admits that Bob Bergland is the Secretary of Agriculture and denies the remaining allegations contained in paragraph 7.

4.

Defendant admits paragraphs 8, 9 and 10.

5.

Defendant denies paragraph 11.

6.

Defendant admits paragraph 12.

7.

Defendant denies paragraph 13.

8.

Defendant admits that its Bureau of Land Management has issued leases for the development of minerals on or underlying the bed of the navigable Little Missouri River and denies all other allegations contained paragraph 14.

9.

Defendant is without sufficient facts to confirm or deny paragraph 15.

10.

Defendant admits that part of paragraph 16 which quotes from the North Dakota Century Code and denies the remaining allegations of that paragraph.

11

Defendant is without sufficient facts to confirm or deny paragraph 17.

12.

Defendant denies paragraphs 18 and 19.

AFFIRMATIVE DEFENSES

The United States further answers pursuant to Rule 12(e) of the Federal Rules of Civil Procedure and makes a motion for more definite statement. That rule permits a motion for more definite statement where the Complaint is vague; 28 U.S.C. 2409a(c) requires that the Complaint set forth with particularity the nature of the interest claimed. Accordingly, the United States requests the Plaintiff to file a metes and bounds description concerning the interest claimed by it.

THEREFORE, the Defendant prays for the following relief:

(1) Dismissal of the action;

(2) Costs and such other and further relief as the Court may deem appropriate; and

(3) An order quieting title to the area in dispute.

Dated this 12th day of May, 1980

/s/ _____

HERBERT A. BECKER
Assistant United States Attorney
P. O. Box 1505
Fargo, North Dakota 581[illegible]
Attorney for the Defendant,
United States of America.

Supreme Court of the United States

No. 81-2337

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS,

v.

NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

ORDER ALLOWING CERTIORARI. Filed October 4, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Office - Supreme Court, U.S.
FILED
APR 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.,
PETITIONERS,

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS,
RESPONDENTS/CROSS-PETITIONERS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT O. WEFALD
Attorney General

OWEN L. ANDERSON
Special Assistant Attorney General

UND School of Law
Grand Forks, N.D. 58202
(701) 777-2961

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

Whether a state acting in its sovereign capacity in an action to quiet title against the United States to sovereign public trust lands is subject to the twelve-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).*

---

* The petitioners state the question as "[w]hether a state's action to quiet title against the United States is subject to the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f)." However, the petitioners have phrased the question too broadly. The dispute in this case involves the application of the statute of limitations to a state acting in its sovereign capacity to protect its sovereign public trust lands as opposed to a state acting in a proprietary or other capacity.

TABLE OF CONTENTS

	Page
Stateutes Involved	2
Statement	3
Reasons Why The Writ Should Be Denied	7
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Alabama v. Texas, 347 U.S. 272 (1954)	11
Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)	10
Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935)	9
California v. Arizona, 440 U.S. 59 (1979)	7,15,18,22
California ex rel. State Lands Commission v. United States, 50 U.S.L.W. 4671 ___ U.S. ___, (U.S. June 18, 1982) (No. 89, Original)	10,11
California ex rel. State Lands Commission v. United States, 512 F. Supp. 36 (N.D. Cal. 1981)	24,26
Capitan Grande Band of Mission Indians v. Helix Irrigation District, 514 F.2d 465 (9th Cir. 1975), cert. denied, 423 U.S. 874 (1975)	20
Crowell v. Benson, 285 U.S. 22 (1932)	18
Edelman v. Jordan, 415 U.S. 651 (1974)	21
Federal Energy Regulatory Commission v. Mississippi, 50 U.S.L.W. 4566 (U.S. June 1, 1982) (No. 80-1749)	18

Federal Housing Administration v. Burr, 309 U.S. 242 (1940) 8

Fry v. United States, 421 U.S. 542 (1975) 17

Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 8

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) .. 14

Hodel v. Virginia Surface Mineral & Reclamation Association, 452 U.S. 264 (1981) 18

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) .9,10,13

Kendall v. United States, 14 Ct. Cl. 122 (1878), aff'd, 107 U.S. 123 (1882) 19

Martin v. Waddell, 41 U.S. (16 Pet.) 366 (1842) 17

Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235 (1964) 24

Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) 13,17

Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978) 21

National Bank v. Republic of China, 348 U.S. 356 (1955) 8

National League of Cities v. Usery, 426 U.S. 833 (1976). 17

Nevada v. United States, 628 F.2d 1357 (9th Cir. 1980) (table), cert. denied, 450 U.S. 995 (1981) 22,23

Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977) 20

Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).....9,10,17

Park County, Montana v. United States, 626 F.2d 718 (9th Cir. 1980), cert. denied, 449 U.S. 12 (1981) ..21,24,25

People of the State of California v. United States, 132 F. Supp. 208 (Ct. Cl. 1955) 13,21

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1844). 9,17

Quern v. Jordan, 440 U.S. 332 (1979) 15,21

Shively v. Bowlby, 152 U.S. 1 (1893) 9,17

Soriano v. United States, 352 U.S. 270 (1957) 8

State of New Mexico v. Aamodt, 537 F.2d 1102, 1110 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) 20

Texas v. White, 74 U.S. (7 Wall.) 700 (1869) 13

United Plainsmen Assoc. v. North Dakota State Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976) 9

United States v. 422, 978 Square Feet of Land, San Francisco, 445 F.2d 1180 (9th Cir. 1971) 13

United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (9th Cir. 1956)..... 20

United States v. California, 332 U.S. 19 (1947) 16

United States v. Cooper Corp., 312 U.S. 600 (1941) 15

United States v. Georgia-Pacific Co., 421 F.2d 92, 101 (9th Cir. 1970) 9

United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960)..... 11

United States v. Louisiana, 127 U.S. 182 (1888) 13,19,20,21

United States v. Mission Rock Co., 189 U.S. 391 (1903). 9,17

United States v. Mitchell, 445 U.S. 535 (1980) 7

United States v. Sherwood, 312 U.S. 584 (1941) 7

United States v. Yellow Cab Co., 340 U.S. 543 (1951) .. 8

Utah v. United States, Civil No. C-79-0302 (D. Utah, Filed May 22, 1979) 24,25,26

Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873).....8,9,10,14,16

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).... 15

United States Constitution:

Article III, Section 2 18

North Dakota Constitution:

Article IX, Section 9 12

United States Statutes:

5 U.S.C. 701-706, Judicial Review Under the Administrative Procedures Act..... 4,26

28 U.S.C. 1331, Federal Question 4,25,26

28 U.S.C. 1346(f), District Court Jurisdiction to Quiet Title..... 2,4,18

28 U.S.C. 1361, Mandamus 4,26

28 U.S.C. 1491, Court of Claims 19

28 U.S.C. 2201-2202, Declaratory Judgment Act 4,26

28 U.S.C. 2409a, Quiet Title Act 2,4,5,7,9,14,18,25

28 U.S.C. 2409a(a), Quiet Title Act 2,14,15,16

28 U.S.C. 2409a(b), Quiet Title Act 15

28 U.S.C. 2409a(c), Quiet Title Act 15

28 U.S.C. 2409a(d), Quiet Title Act 2,15

28 U.S.C. 2409a(f), Quiet Title Act i,2,4,5,6,7,11,13,14, 15,16,17,21,22,23,26

28 U.S.C. 2415, Time for Commencing Actions by the United States 18,20

28 U.S.C. 2501, Tucker Act 13,20

43 U.S.C. 1301 et seq., Submerged Lands Act 10

43 U.S.C. 1311(b), Submerged Lands Act 2,11

Rev. Stat. Section 1069 (1878 Ed.) (repealed 1911) 19

Act of March 3, 1911, ch. 14 Section 297, 36 Stat. 1087 . 19

Miscellaneous:

Rule 17.1(a), United States Supreme Court 24

Rule 21(c), U.S. Court of Appeals Ninth Circuit 22

H.R. Rep. No. 92-1559, reprinted in 1972 U.S. Code Cong. & Ad. News 4547, 4547-52, Legislative History-Quiet Title Act 15

H.R. Rep. No. 80-1778, reprinted in 1953 U.S. Code Cong. & Ad. News, 1415, 1435, Legislative History, Submerged Lands Act 11

Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 108, 112 (1959) 24

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.,*

PETITIONERS,

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS,

RESPONDENTS/CROSS-PETITIONERS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Attorney General of the State of North Dakota, on behalf of the Board of University and School Lands, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. This brief in opposition is submitted pursuant to Rule 22.1 of the United States Supreme Court.

---

* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint. See Rule 40.3 of the Rules of this Court.

STATUTES INVOLVED

1. 28 U.S.C. 2409a provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands***.
>
> * * * * * * *
>
> (d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.
>
> * * * * * * *
>
> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

2. 28 U.S.C. 1346(f) provides:

> The district court shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

3. 43 U.S.C. 1311 provides in pertinent part:

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has in and to all said lands, improvements, and natural resources;* * *

STATEMENT

1. This action was commenced in federal district court October 31, 1978. The complaint filed by the State of North Dakota requested (1) a declaratory judgment that the Little Missouri River was a navigable river and (2) equitable relief enjoining the Secretaries of Interior and Agriculture and their subordinates from exercising the privileges of ownership to the bed of the river on behalf of the United States. The State of North Dakota claimed ownership of the bed based on a belief that the river is navigable. The United States owns certain lands[1]

[1] Nearly all of the federal riparian lands are acquired lands not public domain. The surface estate is managed by the United States Forest Service and the mineral estate is managed by the Bureau of Land Management. These lands were acquired pursuant to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010-1012, originally enacted in 1937. There are also substantial amounts of state-owned and privately-owned riparian lands along the Little Missouri River.

that are riparian to the Little Missouri River and apparently asserted ownership of the riverbed under the mistaken belief that the river was not navigable.

On July 10, 1979, the State filed a motion for summary judgment. The petitioners (federal defendants) filed a cross-motion for summary judgment on October 11, 1979. On February 18, 1980, the district court denied both motions and required the State to amend its complaint so as to assert Federal jurisdiction under 28 U.S.C. 2409a and 1346(f) (federal quiet title statute). The State had asserted Federal jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*).[2]

The State did amend its complaint as directed, asserting jurisdiction under 28 U.S.C. 2409a and 1346(f) (federal quiet title statute), however the State still believes that its original assertion of jurisdiction was also proper and correct.[3]

A one-day trial was held. At the trial the State offered evidence that the Little Missouri River was navigable. The petitioners submitted no evidence on the issue of navigability. Instead, the petitioners argued that the twelve-year statute of limitations (28 U.S.C. 2409a(f)) barred the State from the quiet title action. Over the objections of the State, the petitioners offered the testimony of the Bureau of Land Management (BLM) concerning the records kept at the District Office of the BLM in Billings, Montana. In addition, the petitioners offered certain letters that allegedly showed that the State "knew or should

---

[2] In requiring the State to amend its complaint, the district court simply concluded that "the complaint does not support this claim of a Federal question." Petition, App. B, p. 15a.

[3] See Respondent's Conditional Cross-petition for Writ of Certiorari.

have known of the claim of the United States" to the Little Missouri River more than twelve years prior to the filing of its complaint. The State disputed the veracity and relevancy of the evidence and disputed the rationale of the petitioners argument.

In its ruling, the district court did not address the petitioners' evidence because the court ruled that the statute of limitations (28 U.S.C. 2409a(f)) contained in the quiet title statute did not apply to the State where it sought to quiet title to its sovereign public trust lands (the beds of navigable lakes and streams). Moreover, the district court declared that the Little Missouri River was a navigable river at statehood,[4] that title to the bed vested in the State of North Dakota at statehood[5] and that the State cannot be defeated in its assertion of title to the bed.[6] The court's judgment decreed that title to the riverbed "is hereby quieted in the State of North Dakota" with the exception of certain portions of the bed that may constitute part of the Fort Berthold Indian Reservation.[7] Finally, the judgment ordered the United States "to cease and desist from exercising privileges of ownership upon the bed of the Little Missouri River lying within the State of of North Dakota.[8]

2. The petitioners appealed and the State filed a cross-appeal. The State's cross-appeal asserted that its original grounds for jurisdiction were proper and correct. The court of appeals, in affirming the district court judgment, ruled that congress waived sovereign immunity for quiet title actions in 28 U.S.C. 2409a.[9] The court of appeals affirmed the district court's find-

---

[4] Petition, App. C, p. 21a and Petitioners', App. D, p. 29a.

[5] Petition, App. C, p. 21a.

[6] *Id.* at 25a.

[7] Petition, App. D, p. 29a-30a. The portions of the bed that could potentially constitute Indian lands were excluded in the State's complaint that originated the action.

[8] Petition, App. D, p. 30a.

[9] Petition, App. A, p. 4a.

ing that the Little Missouri River was navigable at the time of North Dakots's statehood.[10] The court of appeals affirmed the district court's ruling that the statute of limitations in the federal quiet title statute (28 U.S.C. 2409a(f)) does not apply to states where the title dispute concerns sovereign public trust land.[11] Due to its disposition of the case the court of appeals did not consider the State's cross-appeal.[12]

---

[10] *Id.* at 13a.

[11] *Id.* at 9a.

[12] *Id.*

REASONS WHY THE WRIT SHOULD BE DENIED

Contrary to the petitioner's (federal defendants) phrasing of the issue, the Eighth Circuit's decision is not as sweeping as the petitioners suggest. Petition, p. 13. The decision does not hold that any statute of limitations not expressly including a state is invalid as against a state. Rather the narrow holding of the decision is that a specific statute of limitation (section 2409a(f) of the Quiet Title Act) does not apply to an action by a state acting in its sovereign capacity to protect its sovereign public trust lands.

1. The District Court And Court Of Appeals Properly Found That The Statute Of Limitations[13] Of The Quiet Title Act[14] Does Not Bar A State From Quieting Title To Sovereign Public Trust Lands.

The petitioners (federal defendants) assert that the doctrine of sovereign immunity requires that the United States consent to any suit brought against it. *United States v. Mitchell,* 445 U.S. 535, 538 (1980), quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941). The petitioners further assert that this consent requirement also applies to actions brought by states. *California v. Arizona,* 440 U.S. 59, 61-62 (1979). Petition, p. 7. The State of North Dakota, in amending its original complaint, does not challenge the doctrine of sovereign immunity. On the contrary, the State brought its action pursuant to the Quiet Title Act which contains a waiver of sovereign immunity by the United States.

a. The petitioners argue that the Eighth Circuit's decision would allow states to reap the benefits of section 2409a consent to suit without abiding by its limitations. Petition, p. 8. The

---

[13] 28 U.S.C. 2409a(f).

[14] 28 U.S.C. 2409a.

petitioners further argue that any waiver of sovereign immunity by the United States must be strictly construed. Thus, they conclude that the twelve-year statute of limitations of the Quiet Title Act limits the waiver of sovereign immunity.

As authority the petitioners cite *Soriano v. United States*, 352 U.S. 270, 276 (1957), for the proposition that when the United States consents to be sued, the conditions of its consent "are to be strictly observed and that exceptions to those conditions based on implication are not to be recognized." Petition, p. 7. However, *Soriano* was a suit for money damages against the United States by an individual Phillipine resident under the Tucker Act. *Soriano v. United States*, 352 U.S. at 270-71. This case, on the other hand, involves a claim by a state acting in its sovereign capacity to quiet tile to its sovereign public trust lands. Therefore, the rule *quod nullum tempus occurrit regi* is applicable.

Under the *nullum tempus* rule the defenses of statute of limitations and laches may not be asserted against a sovereign. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938). Further, *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873), this Court ruled that "[s]tatutes of limitations are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Id.* at 70.

Also, this Court has stated as early as 1940 the "waivers by Congress of governmental immunity . . . should be liberally construed" where the federal government is acting in a proprietary status. *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). See also, *National Bank v. Republic of China*, 348 U.S. 356, 359 (1955) ("chilly feeling against sovereign immunity"); *United States v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951) (general trend toward increasing scope of sovereign immunity waiver by the United States). The peti-

tioners leasing of the bed of the Little Missouri River[11] was clearly an exercise of a *proprietary* function while the state's suit is brought in its soveriegn capacity pursuant to the public trust and equal footing doctrines. Compare, *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 101 (9th Cir. 1970) (doctrine of estoppel applies to the government in its proprietary role).

The court of appeals properly noted that "special implications" relating to the applicability of section 2409a(f) exist in this suit since the state is suing in its sovereign capacity, rather than its proprietary capacity, in order to protect its sovereign title interests in public trust land. Petition App. A, p. 5a. The North Dakota Supreme Court has ruled that submerged lands under navigable waters within the state are held in trust for the public. *United Plainsmen Assoc. v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457, 461 (N.D. 1976). See also, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Title to such lands vested in North Dakota absolutely and without reservation upon North Dakota's admission to the Union under the equal footing doctrine. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-71 (1977); *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Weber v. Harbor Commissioners*, 85 U.S. at 65-66. Since this public trust land passed to North Dakota under the equal footing doctrine at the time North Dakota joined the Union, "state title is not subject to defeasance and state law governs subsequent dispositions." *Corvallis*, 429 U.S. at 378. That title to these lands is a basic attribute of state sovereignty was setted in *Pollard's Lessee v. Hagan*, 44 U.S. (3How.) 212, 224-26 (1844), *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1893), and *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903).

---

[11] The petitioners conceded that the Little Missouri River is navigable since they have not sought review of this matter in their petition for certiorari.

In *Corvallis*, this Court reaffirmed the constitutional character of the State's title to sovereign lands by stating:

> [U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred *not by Congress but by the Constitution itself*. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the *title thus acquired by the state is absolute so far as any federal principle of land titles is concerned*. For example, in *Weber v. Harbor Commissioners* (citations omitted), the court reaffirmed the doctrine of *Pollard's Lessee*:
>
> > 'Upon the admission of California into the Union upon equal footing with the original states, *absolute property in and dominon and sovereignty over*, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters . . . .' (Emphasis supplied)

Corvallis, 429 U.S. at 374 (quoting *Weber v. Harbor Comm'rs.*, 85 U.S. 57 at 65-66 (1873). This Court has expressly recognized that sovereign state trust lands have a fundamentally different character than lands merely held by a state or the Federal government in their proprietary capacity. *Illinois Central Railroad v. Illinois*, 146 U.S. at 452-54 (1892).

Congress, by enacting the Submerged Lands Act of 1953, 43 U.S.C. 1301, *et seq.*, confirmed the state's title to the beds of inland navigable waters. *Corvallis*, 429 U.S. at 371 n.4.[16] The

---

[16] In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), this Court stated that "[the Submerged Lands] Act merely confirmed the states' preexisting rights in the beds of the navigable waterways within their boundaries by, in effect, quit claiming all federal claims thereto." *Id.* at 318. In *California ex rel. State Lands Commission v.*

Submerged Lands Act quit claimed all "right, title, and interests of the United States" in such land to the respective states. 43 U.S.C. 1311(b). The application of section 2409a(f) of the Quiet Title Act against a state seeking to protect its public trust lands would, in effect, allow the petitoners to circumvent the provisions of the Submerged Lands Act and nullify the Congressional intent of the Act which expressly disclaimed United States' interests in navigable waters within state boundaries.[11]

United States, 50 U.S.L.W. 4672 (U.S. June 18, 1982) (No. 89, Original), this Court alludes to the proposition that while the Submerged Lands Act *confirmed existing* State title to land underneath inland waters based on the equal footing doctrine, the Act actually *granted* state title to land underlying territorial seas within three miles of state coastal boundaries. 50 U.S.L.W. at 4675. This *granting* of title to coastal submerged land was held to be a constitutional exercise of Congress' power to dispose of federal property. *Alabama v. Texas*, 347 U.S. 272, 273-74 (1954). In *California ex rel. Lands Comm'n* this Court adhered "to the principle that federal *grants* are to be construed strictly in favor of the United States." 50 U.S.L.W. at 4675. Citing *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960) (emphasis supplied). This principle, however, should have no application to a state seeking to protect its title to sovereign public trust lands within its boundaries. Such lands were not *granted* by Congress to the states, but rather, under the equal footing doctrine, were vested in the states by the Constitution upon their admission to the Union.

[11] Section 1311(b)(1) states that "[t]he United States releases and relinquishes unto said States . . . all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources . . . ." *Id.*

It is indeed ironic that Congress' avowed purpose in enacting the Submerged Lands Act was to once and for all confirm and establish the rights and claims of the states to the land and resources beneath navigable waters within their boundaries. It was Congress' intention that the "highly developed, experienced, and efficient state organizations" controlling the submerged oil deposits not be destroyed by transferring such resources to the control of a federal bureau. H.R. Rep. No. 80-1778, *reprinted in* 1953 U.S. Code & Cong. Ad. News, 1415, 1435. Yet, once again this suit finds a state and federal bureaus litigating over the control of these same oil and gas resources.

The petitioners in this action are attempting to do indirectly that which they cannot do directly. The petitioners are attempting to defeat the legitimate claim of a sovereign state to its sovereign public trust land by administratively claiming such lands and then denying the state a forum for protecting its rightful title. To allow the petitioners to hide behind this statute of limitations would deny meaning to the Submerged Lands Act, the equal footing doctrine, and the public trust doctrine.[18]

---

[18] Arguably, any application of section 2409a(f) to a state or any other individual is unconstitutional because, in reality, section 2409a(f) is nothing more than an adverse possession statute favoring the federal government. As such the statute would be invalid for two reasons. First, any application of section 2409a(f) to bar a private suit against the United States to quiet title to land adversely possessed by the United States would violate the fifth amendment's prohibition on the governmental taking of private property without just compensation. The Constitution requires that when the federal government takes property, it must pay for that property. Therefore, any application of section 2409a(f) which allows federal officials to avoid this requirement would directly conflict with the fifth amendment to the Constitution.

Second, it is incompatible with principles of ethical government for the United States to claim by adverse possession land which it does not own. To acquire title by adverse possession a wrongful act (open notorious trespass) must be committed by the adverse possessor. A government should not be allowed to commit such acts nor should the courts sanction such actions by upholding the validity of a statute of limitations such as section 2409a(f) which is, in reality, an adverse possession statute. This is especially so where a state, acting in its sovereign capacity, is seeking to protect its ownership of public trust lands. Moreover, art. IX, section 9, of the North Dakota Constitution prohibits adverse possession against the State:

> No claim for the occupation, cultivation or improvement of any public lands shall ever be recognized, nor shall such occupation, cultivation or improvement of any public lands ever be used to diminish either directly or indirectly, the purchase price of said lands.

b. The petitioners assert that section 2409a(f) applies even to sovereign states. Therefore, they argue that the district court and court of appeals erroneously held that a statute of limitations "does not run against a sovereign, either state or federal, unless the sovereign is expressly designated . . . ." Petition, p. 8. For the proposition that section 2409a(f) applies to sovereign states the petitioners cite *United States v. Louisiana,* 127 U.S. 182 (1888), *United States v. 422,978 Square Feet of Land, San Francisco,* 445 F.2d 1180 (9th Cir. 1971), and *The People of the State of California v. United States,* 132 F. Supp. 208 (Ct. Cl. 1955). However, all these cases are readily distinguishable from the present action. All three of these cases dealt with state claims for monetary damages under the Tucker Act. Furthermore, none of these cases were brought by a state acting in its sovereign capacity to protect its sovereign public trust lands. As discussed above, state title to sovereign public trust lands is vested in the individual states by the Constitution (equal footing doctrine) and was confirmed by the Submerged Lands Act. Moreover, the public trust doctrine even limits the ability of a state to part with its title to such lands. See, e.g., *Illinois Central Railroad,* 146 U.S. at 452-53.

As the court of appeals noted, this case also creates a conflict between two sovereign immunity doctrines. Petition, App. A, P. 7a. On one side, there is the doctrine that a sovereign (North Dakota) should not be subject to the defenses of statute of limitations and laches unless expressly included. Alternatively, there is the principle that consent to suit by a sovereign (United States) should be strictly construed. *Id.* at p. 7a. In this case the conflict should be resolved in North Dakota's favor. In *Texas v. White,* 74 U.S. (7 Wall.) 700 (1869), this Court stated that "[t]he Constitution in all its provisions looks to an indestructible Union, composed of indestructible States." Id. at 725. Further, the most basic premise of federal-state relations is that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy*

v. Mitchell, 269 U.S. 514, 523 (1926). To allow the section 2409a(f) limitation to bar a suit by a state acting in its sovereign capacity would substantially curtail the exercise of its sovereign power over its public trust lands. Therefore, the more appropriate rule of construction to apply concerning section 2409a(f) is the *Weber* rule, 85 U.S. at 70, which states that the defenses of laches and statute of limitations do not apply to a sovereign protecting its sovereign interests unless expressly included within the statute. This is especially true when the other party claiming sovereign immunity is seeking to protect a claim to property in a mere proprietary capacity.

c. The petitioners also assert that the court of appeals erroneously concluded that the absence of references to states in the legislative history shows congressional intent to exclude states from the reach of the limitation provision of the Quiet Title Act. Petition, p. 10-11. Based on *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the petitioners claim that a court should not be free to refuse to give effect to the unambiguous language of a statutory provision limiting the waiver of sovereign immunity simply because the court could find no statement in the legislative history "affirming that the provision means what it says." Petition, p. 10. However, a careful reading of all of section 2409a reveals that the statute is not as unambiguous as the petitioners contend. Subsection 2409a(a) is a general waiver of sovereign immunity by the United States with exceptions as to trust or restricted Indian lands. In the following subsections, however, the focus of the statute is turned from the United States to the party bringing the suit. This shifting of the statute's focus refutes the petitioners' assertion that if section 2409a(f) does not apply to sovereign states then neither should section 2409a(a). Petition, p. 10-11. Based on the organization and seemingly separate focus of the different subsections of the statute it is entirely reasonable that a sovereign state be included

under the general waiver of immunity subsection while it need not be included in other subsections."

In subsections 2409a(b), (c), (d), and (f) references are made to the following: "person," subsection 2409a(b), "plaintiff," subsection 2409a(c), (d), and (f), and "predecessor in interest," subsection 2409a(f). No such references are made in subsection 2409a(a). Therefore, since a logical division occurs between the general waiver of sovereign immunity under subsection 2409a(a) and the specific conditions of the waiver listed in subsections 2409a(b)-(g) and since subsections 2409a(b), (c), (d), and (f) refer to three different parties, it is reasonable that a court should consult the legislative history of the statute in order to determine the application of each separate subsection of the statute.

The legislative history of section 2409a(f), H.R. Rep. No. 92-1559, refers to "persons," "citizens," and "individual citizens" but nowhere does it refer to "states." H.R. Rep. No. 92-1559, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4547, 4547-52. In a relevant situation, this Court has stated that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (citing *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)). Even though these cases involved the construction of statutes, there is no logical reason why this principle should not apply to legislative histories as well. Also, this Court has noted the absence of references to states in a legislative history and has stated that "[w]e can only conclude that this silence on the matter is itself a significant indication of legistative intent . . . ." *Quern v. Jordan*, 440 U.S. 332, 343 (1979).

" Section 2409a(b) refers to "person" which, in common usage, does not include the sovereign. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). Therefore section 2409a(b) clearly does not include a sovereign state.

Significantly, the Quiet Title legislation itself is the result of a title dispute between a private landowner and the United States. *California v. Arizona,* 440 U.S. at 67, n. 7. Furthermore, as originally drafted section 2409a(a), the sovereign immunity waiver, stated that "[t]he United States may be named a party in any civil action brought by *any person* to quiet title to lands claimed by the United States." 440 U.S. at 67, n. 7 (emphasis supplied). The "any person" phrase was subsequently deleted. The fact that this phrase was deleted evidences Congressional intent to include the states in the waiver of sovereign immunity. Therefore, since section 2409a(f)'s legislative history refers specifically to "persons", the statute of limitations, itself, was intended by Congress to cover only stale claims by private individuals and not sovereign state title claims to public trust lands. This is especially true when the equal footing doctrine and the Submerged Lands Act are included in the analysis.

d. The petitioners state that the reasoning applied in *Weber, supra,* and *United States v. California,* 332 U.S. 19 (1947) (that where "public trust" lands are concerned, a sovereign cannot be barred by laches or statute of limitations from suing to assert title) is not applicable in this suit since the national sovereign is seeking to invoke a statute of limitations defense and not a private individual or foreign sovereign. Petition p. 9. However, the petitioners ignore the capacity of the parties. The sovereign State of North Dakota, based on the equal footing doctrine, public trust doctrine, Submerged Lands Act, and the Constitution, is the party acting in its sovereign capacity (protecting sovereign public trust lands) while the petitionersare fulfilling merely a proprietary function (managing acquired federal land for multiple use). Therefore, the state's claim is not subject to the laches or statute of limitations defenses of any other individual or sovereign.

e. The application of 2409a(f) to bar the State's claim would violate the tenth amendment to the Constitution. The tenth amendment "expressly declares the constitutional policy that

Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. *Fry v. United States*, 421 U.S. 542, 547, n. 7 (1975). See also, *Metcalf v. Eddy*, 269 U.S. at 523. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that a congressional exercise of power that would be valid against private individuals is nonetheless invalid if it impairs the sovereignty of the states or infringes upon matters "essential to [the states'] separate and independent existence." *Id.* at 845. As stated in *Usery*:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845. A long line of decisions from this Court has clearly and consistently held that a basic attribute of state sovereigty is its title to and dominion over its sovereign lands. Beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842), this Court ruled that title to submerged lands beneath navigable waters were sovereign lands reserved by the original thirteen states when they entered the Union. *Id.* at 410. Three years later this Court held that this same reservation applied under the equal footing doctrine to all states subsequently admitted to the Union. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). See also, *Shively v. Bowlby*, 152 U.S. 1, 49 (1893); *United States v. Mission Rock Company*, 189 U.S. 391, 404 (1903). Title to sovereign state land is of constitutional dimension since it is "conferred not by Congress but by the Constitution itself." *Corvallis*, 429 U.S. at 374. Should section 2409a(f) be applied in this case to bar the state's claim, it would effect a forfeiture of North Dakota's sovereign trust lands and divest the State of sovereign title without a judicial adjudication. This is precisely the kind of federal action impairing basic attributes of sovereign

states that is prohibited by the tenth amendment. See *Hodel v. Virginia Surface Mineral & Reclamation Association,* 452 U.S. 264 (1981); *Federal Energy Regulatory Commission v. Mississippi,* 50 U.S.L.W. 4566 (U.S. June 1, 1982) (No. 80-1749.

There is no statute of limitations for actions by the United States when protecting its sovereign title interests. See 28 U.S.C. 2415(c). Hence the application of section 2409a(f) to actions by the states would critically disadvantage the states in their ability to protect their sovereign lands against competing federal claims. It is undisputed that Congress may impose conditions when it waives sovereign immunity. However, it may not impose condictions to that waiver which violate the Constitution. For example, Congress has specified that suits against the United States based on its waiver of sovereign immunity under section 2409a must be brought in federal district court. 28 U.S.C. 1346(f). This condition, however, violates the jurisdictional grant in Article III, section 2 of the Constitution which permits states to bring original actions in the Supreme Court. This Court, in *California v. Arizona,* 440 U.S. 59 (1979), construed the jurisdictional condition in section 1346(f) so as to allow the states to bring original actions under section 2409a in the Supreme Court despite the contrary wording of section 1346(f). Id. at 66-68. In so construing the jurisdictional condition this Court saved the statute and avoided a confrontation with article III, section 2.[20] Likewise, the Eighth Circuit has properly construed section 2409a(f) in this suit and thus saved the statute of limitations section from a constitutional confrontation.

---

[20] In *California v. Arizona* this Court stated that when the constitutionality of a statute is challenged "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 440 U.S. at 66 (citing *Crowell v. Benson,* 285 U.S. 22, 62 (1932)).

2. No Conflict Exists Between This Eighth Circuit Decision And The Other Circuits Since The Decisions Relied On By The Petitioners Did Not Involve A Sovereign State Seeking To Protect Its Title To Sovereign Public Trust Lands.

The petitioners (federal defendants) assert that this Eighth Circuit decision conflicts with *United States v. Louisiana, supra,* and with decisions from the Ninth Circuit and Court of Claims. Petition, p. 11. These cases, however, are easily distinguishable from the present case.

United States v. Louisiana, supra, involved a monetary claim by the State of Louisiana for five percent of the net proceeds from the sale of federal land by the federal government. 127 U.S. at 182. Moreover, Louisiana's right to the proceeds of the sale did not arise from any sovereign title in Louisiana but rather under a congressional act which was enacted in order to provide swamp land reclamation and road construction funds for the developing states. *Id.* at 182-83. Also, the statute of limitations, Rev. Stat. section 1069 (1887 Ed.) (repealed 1911), applied in *Louisiana* was a general statute limiting the jurisdiction of the Court of Claims.[21] In this case, however, the applicable statute, 28 U.S.C. 2409a, *et seq.*, limits causes of action rather than court jurisdiction to hear those actions.[22] Court of Claims jurisdiction is limited to *claims,* usually monetary damages, against the United States. See 28 U.S.C. 1491. The

---

[21] Section 1069 was expressly repealed by the Act of March 3, 1911, ch. 14, section 297, 36 Stat. 1087.

[22] In *Kendall v. United States,* 14 Ct. Cl. 122 (1878), *aff'd,* 107 U.S. 123 (1882), the court found that there was a great difference between section 1069 and other statutes of limitation. The court stated that it was "not aware of any [other] such statute that declares a *demand barred* if not sued on within the prescribed time; but the prescription always applies solely to the right of action thereon." *Id.* at 123 (emphasis in original). Therefore the clear implication is that section 1069 barred *demands,* such as monetary claims, rather than the specific *cause of action* from which the demand arose.

State in the present action is seeking to quiet title to its sovereign public trust lands by enjoining the petitioners from interfering with the State's exercise of its sovereign rights to this land. The State is not litigating a claim for money damages. Therefore, this suit would be outside the jurisdiction of the Court of Claims primarily because an injunction is sought and not because the six-year limitations bar of the present day equivalent of section 1069, 28 U.S.C. 2501, applies. *Louisiana,* therefore, is simply inapposite since no title to sovereign trust land was in dispute nor was the statute of limitations applied to a sovereign state attempting to protect those lands.[23]

---

[23] The state's relationship to its trust land is much like the federal government's relationship to the land it holds in trust for the Indians. When the United States (or the Indian Tribes themselves) acts as a trustee in charge of Indian lands, no defense of laches, estoppel, or statute of limitations will bar the government's action. *United States v. Ahtanum Irrigation District,* 236 F.2d 321, 334 (9th Cir. 1956)). *See also, State of New Mexico v. Aamodt,* 537 F.2d 1102, 1110 (10th Cir. 1976). This same principle applies to a state acting in a sovereign capacity as trustee of its public trust lands. However, a statute of limitations is available against the United States for claims brought by the federal government on behalf of an Indian tribe for money damages arising from contract or tort law relating to Indian land. 28 U.S.C. 2415. Under section 2415(b), a suit by the United States to recover monetary damages to Indian trust land is barred if brought more than six years and ninety days after the right of action accrues. *Id. See, Capitan Grande Band of Missouri Indians v. Helix Irrigation District,* 514 F.2d 465, 469 (9th Cir. 1975), *cert. denied,* 423 U.S. 874 (1975). *See also, Oneida Indian Nation of New York State v. County of Oneida,* 434 F. Supp. 527, 543-44 (N.D.N.Y. 1977). The effect of the section 2415 statute of limitations on United States claims directly parallels the effect of section 2501 of the Tucker Act on claims by the individual states. Just as section 2415 bars state federal monetary claims for damages, section 2501 likewise bars stale state monetary claims for damages. Therefore it is not incongruous that one statute of limitation may apply to the state or federal government when suing in one capacity or on a specific claim, while yet another statute of limitation is not applicable due to the nature of the state or federal governments claim, such as a sovereign state's action to quiet title to its public trust lands.

In *People of the State of California v. United States,* 132 F. Supp. 208 (Ct. Cl. 1955), the court stated that the six year statute of limitations under the Tucker Act applied to a state. *Id.* at 211. However, the court's jurisdiction was based on the Tucker Act and this suit, like *Louisiana,* was also brought to recover a monetary claim. Significantly, in *California,* the United States possessed a recorded deed to the land in question. California challenged the validity of the United States' deed based on the principle that the adverse possession doctrine does not apply as against a sovereign state. *Id.* at 210. California did not, however, challenge the validity of the statute of limitations as applied to the State. In the present suit, on the other hand, North Dakota seeks to quiet title to its sovereign land rather than press a claim for monetary damages. Also, no deed exists in the present case showing any color of title in the United States.

Finally, the petitioners assert that the Ninth Circuit decision in *Park County, Montana v. United States,* 626 F.2d 718 (9th Cir. 1980), is at odds with this Eighth Circuit decision. Petition, p. 12. In *Park County* the district court and court of appeals agreed that the county had failed to show that it enjoyed a different status from other litigants under 28 U.S.C. 2409a(f). *Id.* at 720. However, in the present case it is a sovereign state acting in its sovereign capacity which is seeking to avoid the limitation of Section 2409a(f). A sovereign state has a fundamentally different status than a county which is not a sovereign but is merely a creature of a state having a status much like a corporation. As such, counties do not possess the same privileges and immunities as sovereign states. See, e.g., *Quern v. Jordan,* 440 U.S. 332 (1979); *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); *Edelman v. Jordan,* 415 U.S. 651 (1974).

Also, *Park County* was a suit by a county claiming a road easement within the boundaries of a national forest, not a suit to quiet title to sovereign public trust lands. Therefore, it is clear

that the State of North Dakota, unlike Park County, enjoys a status different from other litigants under section 2409a(f) when it acts as a sovereign seeking to protect its title to public trust lands. The Eighth Circuit did not reject the holding in Park County, but merely distinguished it from this case based on the fundamentally different lands and plaintiffs involved. Petition, App. A, p. 9a.

3. **The Relative Importance Of The Eighth Circuit Decision Is Limited Since It Only Addresses The Question Of Whether The Quiet Title Act Statute Of Limitations, Section 2409a(f), Bars A State's Action To Quiet Title To Its Sovereign Public Trust Lands In A Suit Against The United States.**

The petitioners (federal defendants) argue that this question is important since "actions by states to quiet title against the United States occur with reasonable frequency." Petition, p. 12. The petitioners cite three recent cases in support of this proposition; *California v. Arizona, supra, Nevada v. United States,* 628 F.2d 1357 (9th Cir. 1980) (table), *cert. denied,* 450 U.S. 995 (1981), and the present case.

First of all, in *California v. Arizona, supra,* other than reprinting the statute in a footnote, no mention whatsoever is made of section 2409a(f). The statute of limitations was not involved in the issue at all.

As to *Nevada v. United States, supra,* the decision is unpublished and therefore its value as authority for any proposition of law is questionable. The *Nevada* decision came out of the Ninth Circuit where, under Rule 21(c) of the United States Court of Appeals for the Ninth Circuit, a decision "which is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders . . . ." Therefore, the Nevada decision has no precedential value in the Ninth Circuit. The Eighth Circuit also

disclaims any precedential value in unpublished opinions. See Petitioners' App. A, p. 9a.

Even if *Nevada* had any value as authority, the case is inapposite since the United States claimed the land in question as Indian land. The Quiet Title Act specifically excepts "trust or restricted Indian lands' from the waiver of sovereign immunity. 28 U.S.C. 2409a(a). In *Nevada,* the suit was dismissed on this basis. As an alternative ground the court of appeals stated that the suit was also barred by the twelve year statute of limitations. However, this was mere dicta since the State of Nevada did not challenge the applicability of section 2409a(f) to its claim.

Therefore, of the three recent cases cited by the federal defendants, only in the present case was the applicability of the statute of limitations a major issue that was actually litigated. And only this case concerns a state, acting in its sovereign capacity to protect public trust lands, and the federal government, acting in a proprietary capacity. In other words, this case clearly does not have the sweeping effect on sovereign immunity that the petitioners suggest.

The petitioners also cite pending actions in Puerto Rico and Guam. Petition, p. 13. These cases do not concern sovereigns and sovereign public trust lands since Puerto Rico and Guam are territories, not sovereign states. Hence, these two cases are irrelevant to the issue in the present case.

Finally, the petitioners cite pending actions that involve the statute of limitations defense. Petition, p. 12-13. The fact that several pending actions involve the section 2409a(f) defense of statute of limitations does not, of itself, show that the issue in this case is of general importance nor that a conflict exists of sufficient magnitude to warrant review of the court of appeals decision by this Court. Simply because such cases are pending, in no way buttresses any argument that a square and irreconcilable conflict among the courts exist since these cases have not

yet been decided.[24] Even if some semblence of conflict would appear to exist between the present decision and other decisions cited by the petitioners, certiorari should still be denied. Mr. Justice Harlan once stated that "even where a 'true' conflict may be said to exist, *certiorari* will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals [sic]."[23] Even though the State in no way agrees that a conflict exists in the present situation, it does believe that the future resolution principle is applicable. One of the pending cases cited by the petitioners is *Utah v. United States,* Civil No. C-79-0302 (D. Utah, filed May 22, 1979). Petition, p. 13. *Utah* involves a factual situation and issues almost identical to the present suit. In *Utah,* the State of Utah is seeking to quiet title to a lake bed in an action against the United States. The State of Utah has asserted federal

---

[24] The State recognizes that under Rule 17.1(a) of this Court, conflicts of decisions among the courts of appeal is one factor considered by this Court in determining whether to grant certiorari. See Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 237 (1964). However, as discussed under part 2 above, this Eighth Circuit decision does not conflict with other Supreme Court or court of appeals decisions relating to statute of limitations defenses against sovereigns. Moreover, in one of the pending cases cited by the federal defendants, *State of California ex rel. State Lands Commission v. United States,* 512 F. Supp. 36 (N.D. Cal. 1981), a motion to strike the section 2409a(f) defense raised by the United States was granted by the district court. Therefore, the Eighth Circuit is in agreement with a federal district court in California, which is in the Ninth Circuit. This district court also distinguishes *Park County* on the grounds that *Park County* did not involve a sovereign state seeking to quiet title in public trust lands. The district court specifically noted that in its *Park County* opinion "the [Ninth Circuit] court only addressed the applicability of the statute to the counties, and never returned to discuss the possibility that the statute applied to a state." 512 F.Supp. at 45, n. 1.

[23] Mr. Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 Australian L.J. 108, 112 (1959).

jurisdiction on several grounds as has North Dakota in the present action, including 28 U.S.C. 2409a and 28 U.S.C. 1331. Should *Utah* reach the Tenth Circuit Court of Appeals, that court will surely be required to rule on either the asserted jurisdictional grounds, or the application of section 2409a(f) (statute of limitations), or both. At that time, should the Ninth Circuit hold that *Park County* rather than the present Eighth Circuit decision is controlling, a conflict among the circuits would arise which would certainly be an appropriate basis for granting certiorari. However, granting certiorari at this time would be premature and improper since no true conflict presently exists among the circuits.

CONCLUSION

The court of appeals narrow holding in the decision below that the statute of limitations (section 2409a(f) of the Quiet Title Act) does not apply to an action by a state acting in its sovereign capacity to protect its sovereign public trust lands is correct.

Furthermore, no conflict exists at this time between the present decision and decisions of this Court or the other circuits.[26]

Finally, the relative importance of this decision is limited since it does not hold that all state actions are exempt from statute of limitation defenses as the petitioners suggest. Rather, this decision applies only to a state acting in its sovereign capacity seeking to protect title to its public trust lands. Also, the State still believes that its original assertion of jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1361, 28 U.S.C. 2201-202, and 5 U.S.C. 701-706 was proper and correct. See Respondent's cross-petition. Therefore, the importance of this decision is minimal because, even if section 2409a(f) were held applicable to states, North Dakota is not barred from its action since jurisdiction exists under other statutory waivers of federal sovereign immunity.

---

[26] The State suggests that a more appropriate time for this Court to review the application of section 2409a(f) to states would be after the actions in *People of the State of California v. United States, supra,* and *Utah v. United States, supra,* have reached final disposition in the court below. Only in the event that either the Ninth Circuit in *California,* (should the pending district court decision be appealed) or the Tenth Circuit in *Utah* finds section 2409a(f) applicable to the states, will a true conflict among the circuits exist. At the present time, however, there exists no "square and irreconcilable conflict" sufficient to justify review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.[17]

Respectfully submitted,

Robert O. Wefald
Attorney General
State of North Dakota

Owen L. Anderson
Special Assistant
Attorney General
State of North Dakota

July, 1982

---

[17] In the event that this Court should rule that a writ of certiorari should be issued and that the decision below be reversed, the state respectfully requests that the suit be remanded for further proceedings. The state wishes an opportunity to show that, in any case, the statute of limitation had not run at the time the state initiated suit since the state had no notice of the federal government's alleged interest in the public trust lands until shortly before suit was brought by the state.

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2337

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL.
BOARD OF UNIVERSITY AND SCHOOL LANDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a State's action to quiet title to land against the United States is subject to the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).*

---

* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint and amended complaint. See Rule 40.3 of the Rules of this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Summary of argument	11
Argument:	
I. The limitations provision of the Quiet Title Act is applicable to this action because timely filing is a condition of consent to a suit otherwise barred by sovereign immunity	13
A. This action can be maintained only under the Quiet Title Act	14
B. The limitations provision of the Quiet Title Act governs an action brought by a State under the Act	24
II. The limitations provision of the Quiet Title Act is applicable to this action even if such a suit could have been maintained before 1972 without any waiver of sovereign immunity	29
Conclusion	36

TABLE OF AUTHORITIES

Cases:

Alabama v. *Pugh*, 438 U.S. 781 19
Brown v. *GSA*, 425 U.S. 820 ..... 32, 33
California v. *Arizona*, 440 U.S. 59 ..... 17, 24, 27, 29, 31
California ex rel. State Lands Commission v. *United States*, No. 89, Original (June 18, 1982) .. 24, 28, 29
Carlson v. *Green*, 446 U.S. 14 ..... 32, 33, 36
Confederated Tribes v. *Washington*, 447 U.S. 916 .. 14

Cases—Continued — Page

Cory v. *White*, No. 80-1556 (June 14, 1982) 21
Cummings v. *United States*, 648 F.2d 289 23
Davis v. *Passman*, 442 U.S. 228 ..... 30, 34
Dayton Board of Education v. *Brinkman*, 433 U.S. 406 14
Dugan v. *Rank*, 372 U.S. 609 16
Edelman v. *Jordan*, 415 U.S. 651 ..... 19, 21
Estate of Watson v. *Blumenthal*, 586 F.2d 925 22
Finn v. *United States*, 123 U.S. 227 25
Florida Department of State v. *Treasure Salvors Inc.*, No.80-1348 (July 1, 1982) 19, 34
Ford Motor Co. v. *Department of Treasury*, 323 U.S. 459 19
Guaranty Trust Co. v. *United States*, 304 U.S. 126 26
Hawaii v. *Gordon*, 373 U.S. 57 ..... 16, 18
Holmberg v. *Armbrecht*, 327 U.S. 392 36
Jacobs v. *United States*, 290 U.S. 13 ..... 19, 30
Jaffee v. *United States*, 592 F.2d 712 22
Johnson v. *Railway Express Agency*, 421 U.S. 454 36
Kansas v. *United States*, 204 U.S. 331 ..... 15, 27
Kendall v. *United States*, 107 U.S. 123 25
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 ..... 18, 19, 20
Lassen v. *Arizona Highway Department*, 385 U.S. 458 18
Leiter Minerals, Inc. v. *United States*, 352 U.S. 220 34
Loesch v. *United States*, 645 F.2d 905 31
Malone v. *Bowdoin*, 369 U.S. 643 18
McClellan v. *Kimball*, 623 F.2d 83 23
Mine Safety Appliances Co. v. *Forrestal*, 326 U.S. 371 ..... 19, 34
Minnesota v. *Hitchcock*, 185 U.S. 373 22
Minnesota v. *United States*, 305 U.S. 382 25
Monaco v. *Mississippi*, 292 U.S. 313 15
Munro v. *United States*, 303 U.S. 36 25
Nichols v. *United States*, 74 U.S. (7 Wall.) 122 25
North Carolina v. *Temple*, 134 U.S. 22 19
Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 ..... 18, 19
Oregon v. *Hitchcock*, 202 U.S. 60 ..... 16, 18

Cases—Continued

	Page
Oregon ex rel. State Land Board v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363	16
Park County, Montana v. *United States*, 626 F.2d 718, cert. denied, 449 U.S. 1112	26
People of California v. *United States*, 132 F. Supp. 208	26, 31
Quern v. *Jordan*, 440 U.S. 332	19, 29
Reid v. *United States*, 211 U.S. 529	25
Soriano v. *United States*, 352 U.S. 270	25, 31
Sanitary District v. *United States*, 266 U.S. 405	27
Shively v. *Bowlby*, 152 U.S. 1	8
State of California ex rel. State Lands Commission v. *United States*, 512 F. Supp. 36	26
State of Louisiana v. *Garfield*, 211 U.S. 70	16, 34
State of Nevada v. *United States*, 628 F.2d 1357, cert. denied, 450 U.S. 995	26
State of New Mexico v. *Lane*, 243 U.S. 52	16, 18
State of Oklahoma v. *State of Texas*, 252 U.S. 372	16
State of Oklahoma v. *State of Texas*, 256 U.S. 70	16
Steel Improvement & Forge Co. v. *United States*, 355 F.2d 627	31
United States v. *Alaska*, 422 U.S. 184	16
United States v. *California*, 332 U.S. 19	16, 27
United States v. *Carmack*, 329 U.S. 230	18
United States v. *Clark*, 445 U.S. 253	30
United States v. *Dickinson*, 331 U.S. 745	31
United States v. *422,978 Square Feet of Land*, 445 F.2d 1180	26, 31
United States v. *Kubrick*, 444 U.S. 111	25
United States v. *Lee*, 106 U.S. 196	34
United States v. *Louisiana*, 127 U.S. 182	26
United States v. *Louisiana*, 339 U.S. 699	16
United States v. *Louisiana*, 363 U.S. 1	16
United States v. *Maine*, 420 U.S. 515	16
United States v. *Mississippi*, 380 U.S. 128	16
United States v. *Sherwood*, 312 U.S. 584	25
United States v. *Texas*, 143 U.S. 621	16
United States v. *Texas*, 339 U.S. 707	16
United States v. *Utah*, 283 U.S. 64	16
Utah v. *United States*, 394 U.S. 89	22

Cases—Continued Page

Washington v. *Confederated Tribes*, 447 U.S. 134.. 14
Weber v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 ..... 9-10, 26
Young, Ex parte, 209 U.S. 123 18

Constitution, statutes and regulation:

United States Constitution, Fifth Amendment (Just Compensation Clause) 30
Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 5, 24
5 U.S.C. 551(13) 22
5 U.S.C. 701-706 5
5 U.S.C. 702 ..... 9, 11, 13, 22, 23
5 U.S.C. 704 22
5 U.S.C. 706 22
Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 678 18
Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*.. 21
Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. 351 *et seq.* 21
Quiet Title Act (Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176), 28 U.S.C. 1346(f), 1402(d) and 2409a ..... *passim*
28 U.S.C. 1346(f) 5, 31, 33
28 U.S.C. 1402(d) 5, 31
28 U.S.C. 2409a 2, 5, 10, 11, 13, 16, 21, 22, 33
28 U.S.C. 2409a(a) 2, 31, 33
28 U.S.C. 2409a(b) 2, 32
28 U.S.C. 2409a(c) 2-3, 6
28 U.S.C. 2409a(d) 3, 32
28 U.S.C. 2409a(e) 3
28 U.S.C. 2409a(f) ..... *passim*
28 U.S.C. 2409a(g) 3
Submerged Lands Act, 43 U.S.C. 1301 *et seq.* 10, 15, 18, 28
43 U.S.C. 1301(a)(1) 28
43 U.S.C. 1301(f) 28
43 U.S.C. 1311(a)(1) 28
43 U.S.C. 1313(a) 18, 29

Constitution, statutes and regulation—Continued Page

Tucker Act:

28 U.S.C. 1346 24
28 U.S.C. 1346(a) 31
28 U.S.C. 1491 ..... 24, 30, 31
28 U.S.C. 2501 35

28 U.S.C. 1331 ..... 5, 9, 30, 35
28 U.S.C. 1333(1) 33
28 U.S.C. 1343 30
28 U.S.C. 1361 5
28 U.S.C. 1362 30
28 U.S.C. 1441 30
28 U.S.C. 1498(b) 35
28 U.S.C. 1505 30
28 U.S.C. 2201-2202 5
28 U.S.C. 2401 35
28 U.S.C. 2415(a) 35
28 U.S.C. 2415(c) 27
28 U.S.C. 2462 35
43 C.F.R. 192.51 (1963) 7

Miscellaneous: Page

H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. (1972) .. 33, 34, 35

H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. (1976) 23

S. Rep. No. 92-575, 92d Cong., 1st Sess. (1971) 33, 34 35

S. Rep. No. 94-996, 94th Cong., 2d Sess. (1976) 23

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2337

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 671 F.2d 271. The opinion of the district court entered on February 4, 1981 (Pet. App. 17a-28a) is reported at 506 F. Supp. 619. The memorandum and order of the district court entered on February 21, 1980 (Pet. App. 14a-16a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1982 (Pet. App. 31a-32a), and a timely petition for rehearing was denied on March 15, 1982 (Pet. App. 33a). On June 4, 1982, Justice

Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1982. The petition for a writ of certiorari was filed on June 22, 1982, and was granted on October 4, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 2409a provides:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).
>
> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.
>
> (c) The complaint shall set forth with particularity the nature of the right, title, or interest

which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

28 U.S.C. 1346(f) provides:

The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

STATEMENT

The United States holds lands and reserved mineral interests bordering the Little Missouri River in North Dakota and claims title to the bed of that river

primarily as a riparian landowner (Pet. App. 3a n.2, 23a).[1] Some of these lands are administered by the Department of Agriculture, through the Forest Service, the remainder by agencies of the Department of the Interior (Tr. 29, 47-49, 66-67, 68, 72-73, 76-77). Since at least 1955, the Bureau of Land Management has issued oil and gas leases covering portions of the riverbed (Pet. App. 2a; Tr. 24, 34, 35, 57, 97-99, 104-106). North Dakota claims title to the same riverbed as navigable water bottoms under the Equal Footing Doctrine.

1. On October 31, 1978, respondent (hereinafter "the State") commenced this action by filing a complaint against predecessors of the petitioning federal officials, seeking to have them enjoined from issuing mineral leases on the riverbed or otherwise exercising privileges of ownership there (J.A. 6-9). The complaint alleged that the Little Missouri River has been navigable since the time of the State's admission to the Union in 1889, and that the State therefore became the owner of the riverbed under the Equal Footing Doctrine (J.A. 7-8). The complaint asserted that the United States, through its Bureau of Land Management, has issued leases for the development of minerals on and underlying the bed of the river, and that activities of the Department of Agriculture and the Department of the Interior "constitute an unlawful encroachment and a slander of title upon the sovereign lands of the State of North Dakota" (J.A. 8). Accordingly, the State sought relief restraining the federal defendants from developing "or otherwise exercising privileges of ownership upon the

---

[1] In some instances, the United States claimed the bed alone where the State had excluded the riverbed portions of school grant lands and made indemnity selections. See Tr. 38-48.

bed of the Little Missouri River within the State of North Dakota", and declaring the River to be navigable "for the purpose of determining ownership of the bed" (J.A. 9).

The complaint alleged jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*) (J.A. 6). In its answer (J.A. 10-12), and later in a cross-motion for summary judgment, the Government argued that the action was in the nature of a quiet title suit against the United States, and that such an action is authorized only under the Quiet Title Act.[2] Because the action was brought more than 12 years from the date that the State knew or should have known of the claim of the United States, the Government argued that the district court lacked jurisdiction.

In an order entered on February 21, 1980 (Pet. App. 14a-16a), the district court denied the federal defendants' motion for summary judgment.[3] The district court found that "[t]he action lies squarely under 28 U.S.C. § 2409a" (*id.* at 15a). Accordingly, the court ordered the complaint dismissed unless it was amended "to recite an adequate jurisdictional basis" (*id.* at 16a). The court did not address the question of when the State knew or should have known of the claim of the United States (*id.* at 15a).

---

[2] The Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, codified at 28 U.S.C. 2409a, 28 U.S.C. 1346(f) and 28 U.S.C. 1402(d).

[3] That order also denied a motion for summary judgment which the State had filed.

The State subsequently filed an amended complaint on March 12, 1980 (J.A. 13-16), which was substantially identical to the State's original complaint, except that it based jurisdiction on the Quiet Title Act, as well as on the previously-alleged statutes (J.A. 13). The amended complaint did not name the United States as a defendant, nor did it set out the particular land claimed by the United States which was at issue, as required by the Quiet Title Act, 28 U.S.C. 2409a(c).[4]

Subsequently, the United States filed an answer to the amended complaint (J.A. 17-19). It was the Government's position in these proceedings (1) that the Little Missouri River had not been navigable at the time of the State's entry into the Union and that therefore the riverbed was not sovereign land of the State, and (2) that the State's action challenging the federal exercise of ownership over the riverbed was, in any event, barred by the 12-year limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f). A one-day trial was held on December 16, 1980.

2. At that trial, the government presented one witness, an employee of the Bureau of Land Management, who testified as to the Government's activity on the Little Missouri River since 1955, for the purpose of showing that the State knew or should have known of the federal claim more than 12 years before the action was begun and that the suit was therefore

---

[4] During the proceedings, however, it was made clear that the State was claiming the whole of the bed of the Little Missouri River in North Dakota except the portion embraced within the Fort Berthold Indian Reservation, which was left out of the adjudication. See Pet. App. 19a-20a, 29a-30a. See, also *id.* at 3a n.3. Under the approach followed by the courts below, it was presumably unimportant to identify with particularity the areas of riverbed claimed by the United States.

barred by 28 U.S.C. 2409a(f).[5] The State did not present any witnesses. On the question whether the

---

[5] The Government's witness testified that the federal leasing program had been in existence since 1955 (Tr. 24-27, Defendants' Exhibit I), and that five leases issued in 1962 were competitive leases publicly advertised in the State (Tr. 104-107). See 43 C.F.R. 192.51 (1963).

The federal defendants also relied on a letter dated March 18, 1955, from the Bureau of Land Management to the State Attorney General's office, requesting the State's view "whether or not the Little Missouri River was navigable or non-navigable at the time of admission of the State of North Dakota to the Union." The State Attorney General's office had responded by letter dated March 25, 1955 that according to the State Land Commissioner and the Water Conservation Commission, the Little Missouri River "is not now and has not been considered navigable." Those letters were attached to the Defendants' Supplemental Brief of December 5, 1979. See Tr. 123.

Finally, among the documentary evidence submitted by the Government was a letter from attorney Russell R. Mather, addressed to the Bank of North Dakota and the Land Department of the State Board of University and School Lands, dated January 27, 1966, more than 12 years prior to the commencement of the suit (Defendants' Exhibit L 60; Tr. 37). That letter stated:

> In connection with the acquisition by Superior Oil Company of certain leases pertaining to the river bed of the Little Missouri, we have been advised that the United States Government is claiming an interest in the river bed on the basis that it was not a navigable river at the time of the entry of the State of North Dakota into the Union. We submit that in accordance with the position of the State of North Dakota, the Little Missouri was, in fact, navigable and that the State of North Dakota is the owner of the river bed.
>
> It is possible that representatives of the State of North Dakota would wish to confer with the Department of the Interior to see if this question can be resolved by litigation so that the rights of the respective parties may be established.

Little Missouri River was navigable at the time the State entered the Union, the State relied on documentary evidence it had previously presented.

On February 3, 1981, the district court entered a Memorandum and Order (Pet. App. 17a-28a). With regard to the navigability of the river, the district court briefly discussed the historic data submitted by the State and concluded that the river was navigable at the time the State was admitted to the Union.[6] Accordingly, the court found that the riverbed vested in the State under the Equal Footing Doctrine enunciated in *Shively* v. *Bowlby*, 152 U.S. 1, 26-31 (1894).

The district court further held that the action was not barred by the statute of limitations, because the limitations provision of the Quiet Title Act applied only to natural persons or corporations, and not to a "sovereign" with respect to "trust lands held in its sovereign capacity" (Pet. App. 25a-27a). Because the district court found the limitations provision inapplicable, it did not rule on the federal defendants' allegation that the State had had notice of the federal claim to the riverbed more than 12 years before this lawsuit was brought.

In its final judgment, the court declared, inter alia, (Pet. App. 29a-30a) that "[t]itle to the bed of the Little Missouri River within the State of North Dakota, excluding [a specified area], is hereby quieted

---

[6] The district court relied essentially on (1) an account of a trip down the Little Missouri in 1804 by a French Canadian, Baptiste Le Page, who concluded that the river was essentially non-navigable, even though he managed the trip in his canoe; (2) a report of a logging operation in 1881-1882 that managed to float some logs down the river (though the operation was a failure); and (3) some present-day canoe traffic (Pet. App. 20a-21a). The court also concluded that the river has continued to be navigable to this date (*id.* at 21a).

in the State of North Dakota," and it directed (*id.* at 30a) "the United States * * * to cease and desist from further developing or otherwise exercising privileges of ownership" upon that riverbed within the State.[7]

3. On cross-appeals, the court of appeals affirmed the district court's judgment in all respects (Pet. App. 1a-13a). It concluded (*id.* at 4a-9a) that the limitations provision in the Quiet Title Act, 28 U.S.C. 2409a (f), cannot be asserted by the United States against States, at least where "public trust lands" are concerned. On the merits, it affirmed the district court's finding with respect to the navigability of the Little Missouri at the time of the State's admission to the Union (Pet. App. 10a-13a), although it noted that "the evidence in the record concerning navigability is rather thin" (*id.* at 13a). Because it found district court jurisdiction under the Quiet Title Act, the court of appeals declined to rule on the State's contentions that the federal question provision, 28 U.S.C. 1331, was an adequate jurisdictional basis for the action and that if any statutory waiver of sovereign immunity was required, such a waiver was to be found in the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702 (Pet. App. 9a).[8]

In its ruling on the statute of limitations question, the court of appeals started from the premise that, "[u]nder the rule of *quod nullum tempus occurrit regi* the defense of statute of limitations and laches cannot be asserted against a sovereign" (Pet. App. 4a), and that in American law, exemplified by *Weber* v.

---

[7] The portion of the riverbed excluded from the judgment was land within the Fort Berthold Indian Reservation occupied by the Three Affiliated Tribes. See note 4, *supra*.

[8] This issue is raised in the State's conditional Cross-Petition for a writ of certiorari in No. 82-132.

Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 70 (1873), the rule is qualified only by an exception for cases in which "the statute expressly designates the sovereign or when the sovereign must necessarily be subject to the statute as determined by legislative intent" (Pet. App. 5a). The court also emphasized the character of the lands in question as "[p]ublic trust lands," which it defined as "lands * * * held in trust for the citizens of a state [as] distinguished from lands which the State holds in a proprietary capacity" (*ibid.*).

The court noted (Pet. App. 6a) that States are not specifically mentioned in 28 U.S.C. 2409a(f), which applies to "[a]ny civil action" brought under 28 U.S.C. 2409a, and that they were not expressly referred to in the legislative history of the Quiet Title Act. In the court's view, this congressional silence evidenced an intent to exclude the States from the application of this provision of the Act (Pet. App. 6a). The court also concluded (*id.* at 7a), on the basis of the enactment in 1953 of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (which confirmed in the States title to lands beneath waters navigable at the time of statehood), that Congress would find the policies of limitations provisions—notably the desirability of limiting the litigation of stale claims—inapplicable to claims asserted by States.

The court briefly considered the federal defendants' contention that the limitations provision in 28 U.S.C. 2409a(f) is a condition of the waiver of sovereign immunity by the United States and that such waivers must be strictly construed; but it observed (Pet. App. 7a) that this was merely a principle to be weighed against the State's immunity from limitations provisions that do not expressly mention the States. In

balancing the two, the court concluded (*id.* at 7a-8a) that because "the interest of the people of the State of North Dakota is quieting title to public trust lands is great" and because Congress could, in any event, amend the Quiet Title Act to make the limitations provision expressly applicable to the States, the State's interest should prevail.

SUMMARY OF ARGUMENT

I

A.

The present suit is esentially an action to try title to land the United States claims to own and presently possesses. Absent a statutory waiver, sovereign immunity bars any suit to wrest title from the federal Government. That rule applies to States no less than private citizens. And, at least in circumstances like those presented here, the barrier of sovereign immunity cannot be circumvented by suing the federal custodian, rather than the United States by name. Nor does the State's assertion that its title derives from the constitutional Equal Footing Doctrine justify any exception to the principle that no action will lie to require a transfer of land from the national domain unless Congress has consented.

In the present context, the applicable waiver statute is the Quiet Title Act, 28 U.S.C. 2409a. By its terms, Section 702 of the Administrative Procedure Act does not reach this case. Although States are not expressly mentioned as potential plaintiffs under the Quiet Title Act, there is no reason to exclude them. Indeed, this Court has twice recently construed the Act as embracing State land claims asserted against the United States.

B.

Since North Dakota must invoke the Quiet Title Act, it is, like any other plaintiff, bound by the conditions attached to the consent to suit. One of these is that the action be filed not later than 12 years after the plaintiff knew or should have known of the federal claim. Although, vis-a-vis their own citizens, sovereigns are usually exempt from time limitations, that rule is inapplicable when a State is suing the Nation. Most courts, including this Court, have held a State plaintiff subject to limitations provisions with respect to its claims against the United States. There is no basis for any special exemption here. Having necessarily invoked the Quiet Title Act, North Dakota must live by all its terms, including the requirement of filing its claim within 12 years of notice or constructive notice of the federal interest.

II

The result is no different even if—contrary to our primary argument—sovereign immunity is not a bar to North Dakota's suit. At the least, the Quiet Title Act of 1972 established a uniform procedure for prosecuting claims to land to which the United States asserts title. Here, every consideration suggests that Congress meant to provide a single procedural scheme for such actions, not merely a supplemental remedy. Accordingly, whatever alternatives, if any, existed before, the Quiet Title Act has now fully occupied the field, and the rules there prescribed, including time limits, must be followed.

Given the adequacy of the new remedy, there can be no question of Congressional power to "regularize"

procedure as it has done. The "constitutional" basis of the State's claim does not exempt it from such procedural rules. Nor is there any basis for believing that the Quiet Title Act is in any respect unsatisfactory to vindicate constitutional rights. It is wholly reasonable to treat as stale claims to land where the federal interest has been manifest for more than 12 years.

ARGUMENT

I. THE LIMITATIONS PROVISION OF THE QUIET TITLE ACT IS APPLICABLE TO THIS ACTION BECAUSE TIMELY FILING IS A CONDITION OF CONSENT TO A SUIT OTHERWISE BARRED BY SOVEREIGN IMMUNITY

Our primary submission is simply that the 12-year limitations period announced by 28 U.S.C. 2409a(f) governs this case because that provision stipulates a condition to the maintenance of any action under the federal Quiet Title Act, 28 U.S.C. 2409a, a statute consenting to suit against the United States that must be followed in all its terms. This assumes, of course, that the present action is one under the Quiet Title Act, a point disputed by North Dakota in both courts below and now tendered by its Cross-Petition, No. 82-132.[9] Accordingly, we initially ask whether, because

[9] No action having been taken on the Cross-Petition, we might treat this threshold question as not presently before the Court. Yet, we believe it would be pointless to obtain a ruling that a State, like any other plaintiff, is bound by the limitations provision of Section 2409a(f) when it invokes the Quiet Title Act, if a State is free to circumvent that holding by eschewing the consent statute and obtaining the same relief under 28 U.S.C. 1331 and 5 U.S.C. 702—as North Dakota here sought to do. Indeed, it may well be that, independently of its Cross-Petition, the State is entitled to defend the judgment in its favor on the alternative ground that its

sovereign immunity would otherwise bar the suit and no other waiver statute applies, North Dakota was required to invoke the Quiet Title Act here.[10] After answering that question in the affirmative, we turn to the issue whether a State, claiming "constitutional" title, is specially exempted from the limitation provision of the statute.

A. This action can be maintained only under the Quiet Title Act

1. All relief sought by North Dakota is premised solely on its contention that the State, rather than the United States, owns the bed of the Little Missouri River in the relevant stretch. It has never been suggested that the activities of the federal officials complained of—primarily leasing the water bottoms for oil and gas development—are not authorized by statute or contravene the Constitution if the United States is the true owner. And, similarly, the United States has invoked only its claimed ownership of the riverbed as justification for its actions. In short, the dispute is over title to the submerged lands—nothing else.

---

suit was not required to invoke the Quiet Title Act at all. See, e.g., *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). At all events, if necessary, the Court is free to consider this issue by granting the Cross-Petition to this extent when it decides the case on the merits. Cf. *Confederated Tribes* v. *Washington*, No. 78-60, decided with *Washington* v. *Confederated Tribes*, 447 U.S. 134, 164 n.32 (1980); 447 U.S. 916 (1980). Notwithstanding our earlier Memorandum in Opposition, we urge the Court to follow that course if the issue is not otherwise here.

[10] We note our alternative argument (pages 29-36, *infra*) to the effect that the Quiet Title Act controls the present action even if sovereign immunity would not have prevented a like suit before 1972.

To be sure, the predicate of North Dakota's claim is that the River was "navigable" at the time of its admission to the Union, and the State invokes the Equal Footing Doctrine, its Organic Act and the Submerged Lands Act as confirming its title to the riverbed. And we deny that the portion of the Little Missouri involved was or is navigable.[11] But that does not make this a case about navigability, rather than ownership. It is common ground that if the River was navigable at statehood, the bed belongs to North Dakota and, if it was not, to the United States as riparian owner. Navigability is relevant only because it directly determines title. As North Dakota candidly stated in the prayer of its Complaint (¶ 2, J.A. 9, 16), a declaration that the River was navigable was sought "for the purpose of determining ownership to the bed." The upshot is that we are confronted with an action to quiet title to land.

This accordingly appears to be the classic case of a State asserting a claim against the United States that founders on the bar of sovereign immunity, absent an express waiver by Congress. See *Kansas* v. *United States*, 204 U.S. 331, 342 (1907); *Monaco* v. *Mississippi*, 292 U.S. 313, 321 (1934).[12] Normally, of

---

[11] North Dakota persists in asserting that we have conceded the navigable character of the Little Missouri River in the relevant stretch. We have not. The position of the United States in every court has been that the issue of navigability could not be reached because the suit was barred by limitations. Even assuming that if we do not prevail on that threshhold defense, we will be foreclosed from contesting navigability (a proposition we dispute), it does not follow that we must be taken to have admitted that the River was navigable.

[12] Of course, no waiver of sovereign immunity is required when the United States itself invokes the courts to vindicate its claim of title, whether by initiating the lawsuit or volun-

course, the obstacle cannot be circumvented by suing an officer of the Government. E.g., *Oregon* v. *Hitchcock*, 202 U.S. 60 (1906); *State of Louisiana* v. *Garfield*, 211 U.S. 70 (1908); *State of New Mexico* v. *Lane*, 243 U.S. 52 (1917); *Hawaii* v. *Gordon*, 373 U.S. 57 (1963).[13] It is argued here, however, that the State's claim is somehow exempted from the usual rule because it rests on the self-executing force of the Constitution and involves "sovereign trust lands." See *Oregon ex rel State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

2. The short answer is that this was precisely the same character of claim advanced as against the

---

tarily intervening in an action begun by others. E.g., *United States* v. *Texas*, 143 U.S. 621 (1892); *State of Oklahoma* v. *State of Texas*, 252 U.S. 372 (1920); *State of Oklahoma* v. *State of Texas*, 256 U.S. 70, 84 (1921); *United States* v. *Utah*, 283 U.S. 64 (1931); *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 363 U.S. 1 (1960); *United States* v. *Maine*, 420 U.S. 515 (1975); *United States* v. *Alaska*, 422 U.S. 184 (1975). See, also, *United States* v. *Mississippi*, 380 U.S. 128, 140 (1965). Indeed, the long list of cases involving disputed land claims between the United States and one or more States in which the United States has been the original plaintiff or intervening plaintiff illustrates the rule that, absent special legislation, the affected State or States could not cast the United States in the role of defendant until the enactment of 28 U.S.C. 2409a in 1972. In the instances cited, the national Government deemed it appropriate to submit its claim of title to adjudication. But the essence of sovereign immunity is that the United States need not do so unless it chooses.

[13] It goes without saying that the State cannot avoid the bar of sovereign immunity because, over objection, a lower court has improperly overruled the plea and decided the merits in its favor. Cf. *Dugan* v. *Rank*, 372 U.S. 609 (1963).

United States in *California* v. *Arizona*, 440 U.S. 59, 63 (1979), which the Court held "could not be maintained in any court" but for the Quiet Title Act. There, as here, the States claimed adversely to the United States lands alleged to constitute the bed of a navigable river, which had automatically inured to California and Arizona at statehood under the Equal Footing Doctrine. Yet, the Court permitted the suit to proceed only by virtue of a construction of the Quiet Title Act that conferred jurisdiction on this Court as well as the district courts. 440 U.S. at 63-68. Obviously, that ruling was superfluous if the sovereign immunity of the United States did not erect a barrier that Congress must waive.

In *California* v. *Arizona*, it is true, the United States was made a defendant eo nomine, whereas here Government officers are sued. But it can hardly be supposed that the States in the former case could have achieved their objective of quieting title by the simple device of substituting the Secretary of the Interior or the Director of the Bureau of Land Management as custodian of the lands claimed. If that solution had been available, presumably the parties or the Court would have suggested it as an alternative to burdening this Court's Original Docket with a difficult jurisdictional question implicating fundamental constitutional doctrine. See 440 U.S. at 65-66. The United States was named defendant because the Nation was the appropriate, indeed the "indispensable," party. *Id.* at 61-62.

3. We need not, however, rest solely on *California* v. *Arizona*. It is little more than a play on words to contend that because the State asserts a "constitutional" title, therefore the officers of the national Government treating that land as a part of the public

domain are acting "unconstitutionally" within the exception recognized by *Malone* v. *Bowdoin*, 369 U.S. 643, 647-648 (1962) and *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 697, 701-702 (1949). Cf. *Ex parte Young*, 209 U.S. 123 (1908). So far as the doctrine of sovereign immunity is concerned, there is no justification for distinguishing between a State claim to land premised on the Equal Footing Doctrine and one based on the State's organic act (as in *Hawaii* v. *Gordon*, *supra*, and *State of New Mexico* v. *Lane*, *supra*) or on a later grant from Congress (as in *Oregon* v. *Hitchcock*, *supra*).[14] These are equally "sovereign" lands, held "in trust" for the people of the State. See *Lassen* v. *Arizona Highway Department*, 385 U.S. 458, 460-461 (1967). Nor are we aware of any constitutional obstacle to the exercise of national sovereign prerogative of eminent domain with respect to State-owned lands, in whatever status held or by whatever title derived. See *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). See, also, *United States* v. *Carmack*, 329 U.S. 230, 236-242 (1946). On the contrary, North Dakota expressly concedes (82-132 Cross-Pet. 15 n.24) that "the Submerged Lands Act * * * specifically allows the United States to condemn the beds of navigable waters. 43 U.S.C. 1311(d)." See, also, 43 U.S.C. 1313(a).

At all events, a claim of "unconstitutionality" is insufficient to overcome the bar of sovereign immunity

---

[14] We note that, here, North Dakota invokes, in addition to the Equal Footing Doctrine, the Enabling Act of Feb. 22, 1889 for the State of North Dakota (ch. 180, 25 Stat. 678), and the Submerged Lands Act (43 U.S.C. 1301 *et seq.*). See 82-132 Cross-Pet. 8. It would be odd if the State's *statutory* claim to the riverbed were foreclosed, but not its *constitutional* claim.

when, as here, a successful judgment would expend itself on the public treasury or the public domain by the compelled delivery to the plaintiff of substantial funds or lands presently held for the citizenry as a whole. That is so in the case of a suit against the State or its officials. *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). See, also, *Florida Department of State* v. *Treasure Salvors Inc.*, No. 80-1348 (July 1, 1982), slip op. 18-19 (plurality opinion). A fortiori, the United States enjoys the same immunity. See *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 691 n.11, citing *North Carolina* v. *Temple*, 134 U.S. 22 (1890); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 374-375 (1945), and cases there cited. No doubt, as *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, *supra*, indicates, the injured State may prosecute an action for just compensation in the Court of Claims if its property has been "taken" by the Nation. But the availability of that remedy, if timely pursued, fully satisfies the Constitution. See *Larson* v. *Domestic & Foreign Commerce Corp. supra*, 337 U.S. at 697 n.18, 703 n.27.

This is the essence of sovereign immunity. No citizen may, without consent, sue to compel a State to disgorge public funds—except only as just compensation for property taken (see *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933))—or to relinquish the lands it holds for the public. And vis-a-vis the United States, neither a citizen nor a State may do so. Here must end the fiction that the allegedly "wrongful" act of the officer is his own and not that of his sovereign, if only because the relief sought requires an

exercise of sovereignty. See Frankfurter, J., dissenting, in *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 711-712. If it were otherwise, nothing would be left of the principle that the sovereign is immune from suit. Increasingly, the supposed "harshness" of the rule has led to legislative waivers, special and general. But such consent statutes merely reflect the persistence of the doctrine. Notably, the Quiet Title Act involved here assumes pre-existing immunity from a suit to wrest title from the national domain. See page 33, *infra*.

4. The present case clearly falls within this "core" area where the principle of sovereign immunity still holds sway, absent a Congressional waiver. North Dakota's Complaint (both as originally filed and as later amended), claiming ownership of the bed of the Little Missouri River for the State (¶ 13, J.A. 8, 15), expressly alleged that the United States, through the Bureau of Land Management and the Forest Service, was "unlawfully asserting ownership" of the riverbed (¶¶ 6 and 7, J.A. 7, 14), by issuing mineral leases and "otherwise unlawfully exerci[zing] other privileges of ownership" (¶ 14, J.A. 8, 14). And while the prayer was not in terms for a judgment "quieting title" in the State, North Dakota sought a declaration that the River was navigable "for the purpose of determining ownership of the bed" (Prayer ¶ 2, J.A. 9, 16)—which comes to the same thing. Indeed, after the district court had proceeded to try the case and found the River navigable (Pet. App. 17a-28a), the State tendered, and the court entered, a judgment expressly quieting "title" to the bed "in the State of North Dakota" and enjoining "the United States" from interfering with that title. (Pet. App. 29a-30a).

In sum, this was no suit to restrain an errant official engaged in an unauthorized frolic of his own. There is not, nor could be, any challenge to the actions of Bureau of Land Management and Forest Service officers as lacking authority in statutes and regulations if the riverbed belonged to the United States. And, of course, there is no claim that the underlying legislation, the Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) or the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351 *et seq.*), is unconstitutional in any respect. The allegation of "unlawful" conduct is confined to the complaint that the United States is erroneously "asserting ownership" of land the State claims for itself. As we said at the start, this is a classic dispute over land ownership and the proceeding is, at bottom, a suit to try title.

It cannot matter that the State sought and obtained only prospective injunctive relief, foregoing any accounting claim for the past. Only last Term, this Court emphasized that *Edelman* v. *Jordan*, *supra*, should not be read as limiting a State's sovereign immunity to suits seeking "a judgment payable from the state treasury." *Cory* v. *White*, No. 80-1556 (June 14, 1982), slip op. 5-6. The same principle surely applies when the Nation's sovereign immunity from suit is implicated. The result here is that a portion of the federal public domain is transferred to State ownership. That is no less a violation of sovereignty than compelling a disbursement from the Treasury. In sum, we agree with the district court that the present action was one that could proceed only upon the basis of an express consent statute —in this instance, the Quiet Title Act, 28 U.S.C. 2409a. See Pet. App. 14a-16a. See also *id.* at 18a-19a.

5. Unquestionably, the Quiet Title Act is the applicable statute by which the United States has waived its sovereign immunity in the present context. There is, in this instance, no unique legislative waiver, specially authorizing the particular suit. Compare *Utah* v. *United States*, 394 U.S. 89, 90 (1969); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387-388 (1902). And, on the other hand, the case does not satisfy the more general provision of the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702, permitting judicial review of "agency action," even where the United States is the named or real party defendant.

Other objections aside,[15] Section 702 is in terms inapplicable when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." This requires us to turn to the Quiet Title Act, 28 U.S.C. 2409a, enacted four years earlier and obviously relevant in the premises. The latter statute waives sovereign immunity only on

---

[15] Whatever the full breadth of 5 U.S.C. 702 (compare *Estate of Watson* v. *Blumenthal*, 586 F.2d 925 (2d Cir. 1978), with *Jaffee* v. *United States*, 592 F.2d 712 (3d Cir. 1979)), it does not easily embrace an action to quiet title to land, or to determine the navigable character of a river. In such a case, there may be no "agency action" (or inaction) to "review," and nothing to "set aside" or "compel." See 5 U.S.C. 551(13), 702, 704, 706. The fact that, in the present instance, the United States had issued leases covering the disputed riverbed is largely fortuitous. Even so, it should be noted that North Dakota's complaint apparently did not seek to annul outstanding leases, but only to enjoin future leases on the basis of a declaration that the river was navigable and therefore in State ownership. We do not pursue the point because we believe it clear that Section 702 is, in terms, inapplicable where another consent statute already occupies the field. Pages 22-23, *infra*.

stipulated conditions, among them that the action be timely filed after actual or constructive notice of the federal claim. 28 U.S.C. 2409a(f). See pages 24-29, *infra*. Thus, it seems clear Section 702 cannot be invoked to assert stale lands claims, since the Quiet Title Act "expressly * * * forbids [such] relief."

At all events, it is hardly conceivable that, without even the most casual remark, the Congress of 1976 meant to remove an important safeguard for the public domain by permitting adverse claimants effectively to try title to long acknowledged federal lands through a suit to "review" the most recent actions of federal officials asserting the ownership of the United States. Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying federal title. Indeed, the Congress of 1976 adverted to the Quiet Title Act as a sound precedent, already providing a satisfactory scheme for challenging federal land claims, and gave no indication that it should be superceded or duplicated with an alternative procedure. The legislative focus was on other categories of cases, not then embraced by any waiver statute. See S. Rep. No. 94-996, 94th Cong., 2d Sess. 7-8, 11-12, 26-27 (1976); H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 8-9, 13-14 (1976). In short, the Quiet Title Act remains the exclusive procedure for judicially resolving land title disputes against the United States. See *Cummings* v. *United States*, 648 F.2d 289 (5th Cir. 1981); *McClellan* v. *Kimball*, 623 F.2d 83 (9th Cir. 1980). See also, Point II, *infra*.

The Quiet Title Act, it is true, makes no express mention of a State as plaintiff. But that is no ground for excluding State claims from its coverage—any more than States should be denied the benefits of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or the Tucker Act (28 U.S.C. 1346, 1491), which equally fail to mention State plaintiffs in terms. This Court has now twice construed the Quiet Title Act as embracing a State allegation of ownership to land claimed by the United States. See *California* v. *Arizona*, *supra*, 440 U.S. at 63-65; *California ex rel. State Lands Commission* v. *United States*, No. 89, Original (June 18, 1982), slip op. 3 n.6. There is no reason to reconsider the question today.

B. The limitations provision of the Quiet Title Act governs an action brought by a State under the Act

Having determined that the Quiet Title Act governs this suit, we look to its terms. While granting consent to sue the United States over title to land, the statute conditions that waiver of sovereign immunity upon the filing of the action "within twelve years of the date * * * the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. 2409a(f). Because there was substantial evidence that North Dakota knew of the federal assertion of title to the disputed riverbed more than 12 years before the present action was filed (see Statement, note 5, *supra*),[16] the critical

[16] Although the United States limited its evidence at trial to the limitations issue, the district court did not determine whether North Dakota "knew or should have known of the claim of the United States" in 1955, or 1962, or early 1966, or at any other date more than 12 years before the suit was filed in October, 1978. Nor did the court of appeals, since

question is whether this limitations provision controls a suit by a State claiming "public trust" lands under the constitutional Equal Footing Doctrine.

1. We submit an affirmative answer is unavoidable. It is, of course, settled that the United States may attach conditions to the waiver of its sovereign immunity from suit, and that such conditions must be strictly respected. That is true when the terms of the consent disallow the presence of third parties (e.g., *United States* v. *Sherwood*, 312 U.S. 584 (1941)), restrict the forum in which the action may be brought (e.g., *Minnesota* v. *United States*, 305 U.S. 382 (1939)), or limit the category of cases that may be appealed (e.g., *Reid* v. *United States*, 211 U.S. 529 (1909). And, most relevantly, limitations provisions requiring the filing of the suit within a stated period are equally enforceable conditions to the waiver of sovereign immunity. *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Accord, *Kendall* v. *United States*, 107 U.S. 123 (1882); *Finn* v. *United States*, 123 U.S. 227 (1887); *Munro* v. *United States*, 303 U.S. 36 (1938); *Soriano* v. *United States*, 352 U.S. 270 (1957). See, also, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 130-131 (1868).

It is not apparent why the same rule should not apply when a State is the plaintiff. The *Minnesota* case, just cited, indicates that it does. And that is in

---

it shared the district court's view that the limitations provision was inapplicable. It is apparent, however, that both courts below treated the evidence of North Dakota's "knowledge" as sufficiently substantial to justify consideration of the question whether 28 U.S.C. 2409a(f) governs a suit by a State. Of course, if our submission is accepted, the case must be remanded for a factual finding as to when North Dakota knew or should have known of the federal claim.

no way a surprising result. After all, vis-a-vis the superior sovereignty of the United States, a State, like any other claimant, sues only by virtue of congressional consent and, in principle, ought to be bound by the terms of that consent. Since limitations provisions are not distinguishable from other conditions attaching to waivers of sovereign immunity, there would seem to be no basis for specifically exempting a State plaintiff from their force. Indeed, this Court has not hesitated to enforce such a bar against a State claim. *United States* v. *Louisiana*, 127 U.S. 182, 185, 192 (1888). And, with the exception of the decision below and one interlocutory district court ruling (*State of California ex rel. State Lands Commission* v. *United States*, 512 F. Supp. 36 (N.D. Cal. 1981)), every other court to consider this question has applied limitations provisions to a suit by a State against the United States. E.g., *United States* v. *422,978 Square Feet of Land*, 445 F.2d 1180, 1187-1188 (9th Cir. 1971); *State of Nevada* v. *United States*, 628 F.2d 1357 (9th Cir. 1980) (table), cert. denied, 450 U.S. 995 (1981); *People of California* v. *United States*, 132 F. Supp. 208 (Ct. Cl. 1955). See, also, *Park County, Montana* v. *United States*, 626 F.2d 718, 720 (9th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

2. The principle that time does not run against the sovereign is out of place here. That rule normally controls as between a State and its citizens. E.g., *Weber* v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873). It derives from considerations of public policy akin to those which inform the defensive doctrine of sovereign immunity. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-133 (1938). But, just as the State's immunity from suit must give way when the United States is the claimant—although

the converse is not true (*Kansas* v. *United States*, *supra*, 204 U.S. at 342)—so, also, the State's exemption from limitations is ineffective when the Nation has consented to be sued only on timely claims, even though the United States suffers no like disability (*United States* v. *California*, 332 U.S. 19, 39-40 (1947); 28 U.S.C. 2415(c)).

The rule may appear one-sided. This is, however, no more than a recognition that, within its sphere, our Constitution gives the national Government ultimate supremacy. A dispute between a State and the United States "is not a controversy between equals" (*Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925)) and the subordinate sovereign must yield to the paramount power, representing the broader interest of all the people of the United States. *Id.* at 426.

We have already dealt with the contention that a different rule applies here because of the "constitutional" origin of the State's title and the "public trust" status of the lands claimed. Given that a suit so based nevertheless requires Congressional waiver of sovereign immunity, it is difficult to appreciate why the terms of that consent should not control.[17]

---

[17] The limitations provision of 28 U.S.C. 2409(f) was not overlooked in the two recent cases in which a State invoked the original jurisdiction of this Court to assert a constitutionally-based land claim against the United States. In *California* v. *Arizona*, *supra*, as the Court noted (440 U.S. at 63 n.4), the United States asserted limitations against California and Arizona as to a portion of the former riverbed claimed by those States. The issue did not reach the Court because the Special Master ruled that the United States had not asserted an unambiguous claim to the land in controversy more than 12 years before the suit and we did not except from that determination. See Report of the Special Master in No. 78,

Here, as elsewhere, the plaintiff invoking a special statutory permission must abide by the conditions attached. As against the United States, the States are not uniquely free to discard the burdens while claiming the privilege.

3. In sum, we believe the court of appeals was entirely correct in suggesting that, even as to a State, "there can be [no] constitutional objection to the federal government's placement of a [time] limit on the extent to which it will give up its immunity." Pet. App. 8a n.8. Where we cannot follow the courts below is in their conclusion that, without explicitly mentioning them as potential plaintiffs, Congress meant to permit States to invoke the Quiet Title Act, yet, without the slightest hint in the text or the legislative history, intended specially to exempt States from the limitations provision of the same statute. See Pet. App. 4a-9a, 18a-19a, 25a-27a. In our view, that is playing fast and loose with legislative silence.[18]

Original 2 (filed June 15, 1981) and the Decree ultimately entered by consent of all parties. 452 U.S. 431 (1981).

In *California ex rel. State Lands Commission* v. *United States, supra,* no limitations defense was interposed because the first unambiguous assertion of ownership by the United States was too recent. See slip op. 2 & n.4.

[18] We cannot accept the suggestion by the court of appeals (Pet. App. 7a) that enactment of the Submerged Lands Act in *1953* is somehow relevant to Congress' intent when considering the Quiet Title Act in *1972*. At best, the Submerged Lands Act, by "relinquish[ing]" to the States the Nation's interest in "lands beneath navigable waters" (43 U.S.C. 1311(a)(1)), including the beds of navigable rivers (43 U.S.C. 1301(a)(1)), revived some stale claims. Even that is qualified in the case of alienated unsurveyed stream beds (43 U.S.C. 1301(f)), lands "retained" by the United States at statehood or later acquired by "eminent domain proceedings

One can logically argue—albeit only by repudiating this Court's statements in *California* v. *Arizona*, *supra*, 440 U.S. at 63-65, and *California ex rel. State Lands Commission* v. *United States*, *supra*, slip op. 3 n.6—that the failure of Congress to mention State claims suggests the total inapplicability of the Quiet Title Act to States. Cf. *Quern* v. *Jordan*, *supra*, 440 U.S. at 343. But no impartial reader can construe the Act as embracing States within the word "plaintiff" in all sections of the statute except only section (f), the limitations provision. Moreover, such a construction is literally impossible under a text that expressly stipulates: "*Any* civil action under this [Act] shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(f) (emphasis added).

II. THE LIMITATIONS PROVISION OF THE QUIET TITLE ACT IS APPLICABLE TO THIS ACTION EVEN IF SUCH A SUIT COULD HAVE BEEN MAINTAINED BEFORE 1972 WITHOUT ANY WAIVER OF SOVEREIGN IMMUNITY

Our principal submission is that North Dakota is bound by the limitations provision of the Quiet Title Act because, without that statutory consent, sovereign immunity would bar the State's suit altogether. Like all others who must invoke Congressional permission to sue the Nation over title to land, North Dakota, we

---

* * * or otherwise in a proprietary capacity" (43 U.S.C. 1313(a)), and any lands "presently and actually occupied by the United States under claim of right" (*ibid.*). But, at all events, there is no basis for reading the Submerged Lands Act as a perpetual assurance that the lands encompassed by the grant would remain in the States regardless of any adverse claim by the United States and a prolonged failure to contest the federal assertion of ownership.

say, must take the sour with the sweet. But we believe the same result follows even if the State could have maintained the present suit before the enactment of the Quiet Title Act.

1. Although the Constitution itself is the basis of a right of action against official action, it has always been accepted that Congress may determine the means through which the right may be implemented—including the form of the action, the forum in which it shall be commenced, the procedure for trial, the governing rules of evidence, and the methods available for executing any judgment rendered. The Judicial Code, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence apply to constitutional claims like all others brought in the federal courts. After all, it is only by virtue of jurisdictional statutes —such as Sections 1331, 1343, 1362, 1441, 1491 and 1505 of Title 28—that suits founded on the Constitution are maintainable in federal courts. See, e.g., *Davis* v. *Passman*, 442 U.S. 228, 231, 236, 243 (1979). And, of course, that is true when no waiver of sovereign immunity is required, and the procedural rules accordingly cannot be viewed as conditions attached to a consent to suit. We submit the same principle applies to time limits imposed by the Judicial Code.

Thus, the Court has held that the Just Compensation Clause of the Fifth Amendment entitles the owner whose property has been taken by the Government to damages, including interest from the date of taking, independently of any statute so providing. *Jacobs* v. *Unted States*, *supra*, 290 U.S. at 16. See, also, *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). Yet, it has never been doubted that Congress could confine such a suit against the United States to

the Court of Claims when the recovery sought exceeded $10,000, as it did in the Tucker Act, 28 U.S.C. 1346(a), 1491. And, more to the point, courts—including this Court—have uniformly sustained the six-year limitations of the Tucker Act against a "constitutional taking" claim. E.g., *Soriano* v. *United States*, *supra*, 352 U.S. at 273-275; *Steel Improvement & Forge Co.* v. *United States*, 355 F.2d 627, 631 (Ct. Cl. 1966); *Loesch* v. *United States*, 645 F.2d 905, 924 (Ct. Cl. 1981). See, also, *United States* v. *Dickinson*, 331 U.S. 745 (1947). Indeed, the time bar has been successfully invoked against belated Just Compensation actions brought by a State. *United States* v. *422,978 Square Feet of Land*, *supra*; *People of California* v. *United States*, *supra*.

2. We believe a like rule governs under the Quiet Title Act. Assuming, arguendo, a State could have, before 1972, judicially challenged title to lands claimed by the United States, it seems to us plain that Congress could determine how and when such a suit must be prosecuted. At the least, the Quiet Title Act —a part of the Judicial Code—announces a new *procedural* scheme for this category of civil actions. Henceforth, an action seeking to quiet in the plaintiff title to federally claimed land must be instituted in the federal district court where the land is located (28 U.S.C. 1346(f), 1402(d));[19] the United States should be named as defendant (28 U.S.C. 2409a (a));[20] the Government may avoid judgment by

---

[19] Or this Court, in the rare instance when the controversy also involves two adverse State claims and therefore falls within the Court's exclusive original jurisdiction. *California* v. *Arizona*, *supra*.

[20] The statute provides that "[t]he United States *may* be named as a party defendant" (28 U.S.C. 2409a(a); emphasis

entering a binding disclaimer (28 U.S.C. 2409a(d)); after an adverse determination, the United States must be permitted to exercise the option of acquiring the land upon payment of just compensation (28 U.S.C. 2409a(b)); and, finally, any such action must be filed within 12 years after the plaintiff knew or should have known of the Government's claim (28 U.S.C. 2409a(f)). We submit each of these procedural stipulations, including the limitations provision, became effective as of 1972 to any suit like North Dakota's regardless whether the Quiet Title Act was necessary as a waiver of sovereign immunity. See *Brown* v. *GSA*, 425 U.S. 820 (1976).

The question, of course, is ultimately one of legislative intent. See *Brown* v. *GSA*, *supra*, 425 U.S. at 825-835. Congress might have provided an alternative remedy against the United States directly, while leaving undisturbed any pre-existing right of action against the government official. Cf. *Carlson* v. *Green*, 446 U.S. 14 (1980). But that is hardly credible in the present context. First, the Quiet Title Act expressly exempts from its coverage certain categories of cases, but does not exclude any action formerly

---

added). But the legislative history indicates that Congress intended the Quiet Title Act to be the exclusive means of challenging federal title to land (see page 33, *infra*), and there is no mention of any potential defendant other than the United States. Accordingly, we read "may" as granting consent to the action, not as offering the plaintiff a choice of federal defendants.

Here, North Dakota did not join the United States by name and we made no objection on that ground. To now require a remand and amendment of the Complaint for that purpose would be entirely wasteful. We therefore waive the point and treat the case as though the United States were formally the defendant.

maintainable against officials under 28 U.S.C. 1331. See 28 U.S.C. 2409a(a). Nor does the statute elsewhere "save" pre-existing remedies. Compare, e.g., 28 U.S.C. 1333(1). On the contrary, the Quiet Title Act, on its face, seems intended to embrace all suits "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a (a). See also, 28 U.S.C. 1346(f).

Moreover, the legislative history of the Quiet Title Act—in sharp contrast to what this Court noted in relation to a recent amendment to the Tort Claims Act in *Carlson* v. *Green*, *supra*, 446 U.S. at 19-20—does not remotely suggest that Congress meant to create a "parallel, complementary cause of action," in addition to the remedy against the officer. The prevailing assumption, in truth, was that no pre-existing judicial remedy existed when title to Government land was claimed. See S. Rep. No. 92-575, 92d Cong., 1st Sess. 1-2, 3-4, 5 (1971); H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 6, 9 (1972). In these circumstances, Congress cannot have been expected to foreclose an alternative cause of action. But we legitimately may ask whether, it if had supposed existing law permitted a suit to try title against Government officials, Congress would have left that path open. See *Brown* v. *GSA*, *supra*, 425 U.S. at 828-829.

We can conceive no reason why that solution would have commended itself. Since only injunctive and declaratory relief was involved, "deterrence" of wrongdoing would not be served by allowing a suit against the agent, instead of the sovereign. Compare *Carlson* v. *Green*, *supra*, 446 US. at 21. Given the traditional stance of the United States to avoid having its title determined "behind its back" (see *Mine*

Safety Appliances Co. v. *Forrestal*, *supra*, 326 U.S. at 375, quoting *State of Louisiana* v. *Garfield*, *supra*, 211 U.S. at 78; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226-228 (1957)), the obvious course was to "regularize" the procedure for all title actions involving Government land by stipulating a single, straightforward suit against the sovereign itself.[21]

3. On the assumption that the Quiet Title Act preempts a previously available action against federal officers—sometimes of constitutional origin—it remains to show that the substitute is adequate. See *Davis* v. *Passman*, *supra*, 442 U.S. at 245. Certainly, there can be no complaint that the opportunity to obtain a binding judgment quieting the plaintiff's title as against the United States itself is less satisfactory than the supposed right to secure relief against the officer which, at least in theory, does not bind the sovereign. See *Leiter Minerals, Inc.* v. *United States*, *supra*, 352 U.S. at 226-227; *United States* v. *Lee*, 106 U.S. 196, 222 (1882). See, also, *Florida Department of State* v. *Treasure Salvors Inc.*, *supra*, slip op. 16, 28. The only arguable question is whether the limitations provisions of 28 U.S.C. 2409a(f) is, in some respect, unduly restrictive.

The point arises because the Quiet Title Act, when enacted, wholly foreclosed stale claims—perhaps including the present case.[22] It is indeed crystal clear

---

[21] One can hardly suppose that the Department of Justice and the Department of the Interior, in recommending passage of the Quiet Title Act, would have understood that it provided a supplementary alternative to suits against officers. See S. Rep. No. 92-575, *supra*, at 2, 3-4, 5-6; H.R. Rep. No. 92-1559, *supra*, at 4, 7-10.

[22] As we have noted (notes 5 & 16, *supra*), North Dakota's cause of action may have accrued as early as 1955, in which

from the legislative history of the Act that, in 1972, Congress meant to bar any claim against Government lands that had "accrued" more than 12 years earlier. See H.R. Rep. No. 92-1559, *supra*, at 5, 7-8.[23] Thus, it might appear that, as applied to old claims, instead of "substituting" an equally effective remedy, the Quiet Title Act, through its limitations provision, "cut off" a preexisting cause of action—assuming such an action was not foreclosed by sovereign immunity before 1972. And this is impermissible, it can be argued, when the underlying right is of constitutional origin.

The answer, of course, is that any claim that could have been filed more than 12 years before the Quiet Title Act properly could be deemd to have lapsed by operation of laches or limitations without regard to the new statute. Significantly, the longest period of limitations known to federal law before the Quiet Title Act was six years. See 28 U.S.C. 1498(b), 2401, 2415(a), 2462, 2501. Although none of these provisions is directly applicable to an action against government officers under 28 U.S.C. 1331, the six-

---

even it was foreclosed by the time bar of 28 U.S.C. 2409a(f) well before the Quiet Title Act became law in 1972. On the other hand, if the State only knew or should have known of the federal claim in 1962 or 1966, North Dakota had an opportunity to invoke the Act.

[23] An earlier version of the legislation contained an "escape hatch" or "grandfather" clause permitting old claims to be filed within two years of the effective date of the Act. See S. Rep. No. 92-575, *supra*, at 3. This was strongly objected to by the Department of Justice as inviting a flood of "stale claims" and the bill was amended to eliminate the "grandfather clause" but to reach back 12 years instead of only six. H.R. Rep. No. 92-1559, *supra*, at 5, 7-8.

year rule for suits against the United States is an obvious guideline in considering laches or in fashioning an appropriate limitations period.[24] Generously doubling that period and reaching back 12 years certainly cannot be labelled unreasonable, at least when the time is counted only from the date when the Government made its claim to the land manifest.

CONCLUSION

The judgments below should be vacated insofar as they determine the navigability of the Little Missouri River in the relevant stretch and reversed insofar as they hold 28 U.S.C. 2409a(f) inapplicable. The case should be remanded to the District Court for a determination under Section 2409a(f) whether the State of North Dakota knew or should have known of the federal claim to the lands in dispute more than 12 years before the present action was filed.

---

[24] To be sure, federal courts usually borrow from State law the most appropriate limitations rule when federal law is silent on the point. E.g., *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). But this is not the inevitable result, especially when equitable relief is sought. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). When the cause of action derives from federal law and the remedy is against a federal officer, there is special reason for a uniform rule. Cf. *Carlson* v. *Green*, *supra*, 446 U.S. at 23-25 (survival of action). At least when the consequence of the action would be to dispossess the United States of its enjoyment of sovereign land, it would have been natural to apply by analogy the six-year limitations stipulated in federal law for suits against the United States—assuming such an action would lie before 1972. Thus, even before Congress acted, it is likely the courts would have disallowed as stale any such claim not filed for more than 12 years after notice of the federal interest.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

NOVEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 391859 1181

Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, Secretary of Agriculture *Et Al.*,
Petitioners,

VS.

THE STATE OF NORTH DAKOTA, *Ex Rel.*
BOARD of UNIVERSITY and SCHOOL LANDS,
Respondents.

On Writ Of Certiorari To The
United States Court of Appeals For
The Eighth Circuit

BRIEF OF THE RESPONDENTS

ROBERT O. WEFALD
Attorney General

OWEN L. ANDERSON
Special Assistant Attorney
General & Counsel of Record
UND School of Law
Grand Forks, N.D. 58202
(701) 777-2961

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Whether a state acting in its sovereign capacity in an action to protect its rights to sovereign public trust lands against interference by federal officers is subject to the statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).

TABLE OF CONTENTS

Question Presented i

Statutes involved xii

Statement 1

Summary of argument 5

Argument:

I. Application of the statute of limitations represents an unwarranted intrusion on the long-established constitutional prerogatives of the states. 8

II. The limitation provision of the Quiet Title Act may not bar a state from acting in its sovereign capacity to protect its property rights to sovereign public trust land 14

A. The limitation provision is not applicable to the State 14

B. There are independent grounds for jurisdiction 28

Conclusion 36

TABLE OF AUTHORITIES

Cases:

Alabama v. Texas, 347 U.S. 272 (1954) 24

American Federation of Government Employees, Local 1858 v. Callaway, 398 F. Supp. 176 (N.D. Ala. 1975) 33

Andros v. Rupp, 433 F.2d 70 (9th Cir. 1970) 31,32

Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978) 33

Armstrong v. Udall, 435 F.2d 38 (9th Cir. 1970) 32

Barney v. Keokuk, 94 U.S. 324 (1876) 9

Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) 34

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 24

California v. Arizona, 440 U.S. 59 (1979) 23,27

California v. United States, 132 F. Supp. 208 (Ct. Cl. 1955) 17

California ex rel. State Lands Comm'n. v. United States, ____ U.S. ____, 102 S.Ct. 2932 (1982) 24

City & County of Denver v. Bergland, 517 F. Supp. 155 (D. Col. 1981) 28

Collyard v. Washington Capitals, 477 F. Supp. 1247 (D. Minn. 1979) 29

Crowell v. Benson, 285 U.S. 22 (1932) 27

Cummings v. United States, 648 F.2d 289 (5th Cir. 1981) 31

Doe v. United States Civil Service Commission, 483 F. Supp. 539 (S.D.N.Y. 1980) 31

Doria Mining & Eng'g. Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979), cert. denied sub. nom., California v. Doria Mining & Engineering Corp., 445 U.S. 962 (1980) 33

Edelman v. Jordan, 415 U.S. 651 (1974) 17

Employees v. Department of Public Health & Welfare, 411 U.S. 279 (1973) 12

Ervien v. United States, 251 U.S. 41 (1919) 10

Federal Housing Admin. v. Burr, 309 U.S. 242 (1940) .. 19

Finn v. United States, 123 U.S. 227 (1887) 15

Fort Sumter Tours, Inc. v. Andrus, 594 F.2d 1119 (4th Cir. 1977) 33

Fry v. United States, 421 U.S. 452 (1975) 10

Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850) 9,26

Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 15

Hill v. United States, 571 F.2d 1098 (9th Cir. 1978) 28

Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) 9,19

Illinois, ex rel. Scott v. Hoffman, 425 F. Supp. 71 (S.D. Ill. 1977) 29

Jaffee v. United States, 592 F.2d 712 (3rd Cir.), cert. denied, 441 U.S. 961 (1979) 28,34

Kendall v. United States, 107 U.S. 123 (1882) 15

Knox Hill Tenants Council v. Washington, 448 F.2d 1045 (D.C. Cir. 1971) 30

Land v. Dollar, 330 U.S. 731 (1947) 30

Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1948) 30,31,33,34

Lassen v. Arizona Highway Dept., 385 U.S. 458 (1967) . 10

Lombard Corp. v. Resor, 321 F. Supp. 687 (D.D.C. 1970) 33

Malone v. Bowdoin, 369 U.S. 643 (1961) 30,31

Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) 8,13

McClellan v. Kimball, 623 F.2d 83 (1980) 31

Metcalf & Eddy v. Mitchell, 296 U.S. 514 (1926) 10

Monell v. Dept. of Social Services of New York, 436 U.S. 658 (1978) 17

Montana v. United States, 450 U.S. 544 (1981) 9,13,21,26

Munro v. United States, 303 U.S. 36 (1938) 15

NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976) 29

National City Bank of New York v. Republic of China, 348 U.S. 356 (1951) 19

National League of Cities v. Usery, 426 U.S. 833 (1976). 10

Nevada v. United States, 628 F.2d 1357 (9th Cir. 1980) (table), cert. denied, 450 U.S. 995 (1981) 18

Nichols v. United States, 74 U.S. (7 Wall.) 122 (1868) .. 15

Oregon, ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 10

Park County, Montana v. United States, 626 F.2d 718 (9th Cir. 1980), cert. denied, 449 U.S. 1112 (1981) . 17,18

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 12

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). 8,29

The Propeller Genese Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) 9

Quern v. Jordan, 440 U.S. 332 (1979) 17,22

Roaring Springs & Associates v. Andrus, 471 F. Supp. 522 (D.C. Or. 1978) 29

Sanitary District v. United States, 266 U.S. 405 (1925) 20

Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1448 (1982) 28,34

Sheehan v. Army and Air Force Exchange Services, 619 F.2d 1132, reh'g denied, 627 F.2d 239 (5th Cir. 1980), reversed on other grounds, ____ U.S. ____, 102 S. Ct. 520 (1982) 28,34

Shively v. Bowlby, 152 U.S. 1 (1894) 8,9,21

Soriano v. United States, 352 U.S. 270 (1957) 15

United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976) 11

United States v. California, 332 U.S. 19 (1947) 20

United States v. Cooper Corp., 312 U.S. 600 (1941) 22

United States v. 422,978 Square Feet of Land, 445 F.2d 1180 (9th Cir. 1971) 18

United States v. Grand River Dam Authority, 363 U.S. 229 (1960) 24

United States v. Holt State Bank, 270 U.S. 49(1926).... 13,26

United States v. Kubrick, 44 U.S. 111 (1979) 15

United States v. Lee, 106 U.S. 196 (1882) 30,33

United States v. Louisiana, 127 U.S. 182 (1888) 16,17

United States v. Mission Rock Co., 189 U.S. 391 (1903). 10

United States v. Oregon, 295 U.S. 1 (1935)..... 28

United States v. Texas, 339 U.S. 707 (1950) 8

United States v. Yellow Cab Co., 340 U.S. 543 (1951) .. 19

University of Maryland v. Cleland, 516 F. Supp 448 (D. Md. 1981) 28

Utah v. Andrus, 446 U.S. 500 (1980)..... 10

Warin v. Department of the Treasury, 672 F.2d 590 (6th Cir. 1982) 28,34

Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1873).....8,13,15,16,20

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) 20

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976) 29

W. H. Pugh Coal Co. v. United States, 418 F.Supp. 538 (E.D. Wis. 1976) 25

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 22

Zager v. United States, 256 F. Supp. 396 (E.D. Wis. 1966) 32

Constitutional provisions:

United States Constitution

Tenth Amendment 27

Eleventh Amendment 12

North Dakota Constitution

Art. IX, Section 9 11

Statutes:

Administrative Procedure Act

5 U.S.C. 702 7,28,29,33,34

5 U.S.C. 703 33

Pub. L. 94-594, 90 Stat. 2721 (1976) 33

Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-1012 2

Declaratory Judgment, 28 U.S.C. 2201 2,28

Enabling Act of Feb. 22, 1889, Ch. 180, § 7, 25 Stat. 676 (1889) 9

Federal Question, 28 U.S.C. 1331 2,28,34

Louisiana Revised Statutes, § 1069 (1887) 16,17

Court of Claims Jurisdiction, 28 U.S.C. 1491 16

Mandamus, 28 U.S.C. 1361 2,29

Quiet Title Act

28 U.S.C. 1346(f) 3,27

28 U.S.C. 2409a 3,6,11,16,20,27,34

28 U.S.C. 2409a(a) 18,21,23

28 U.S.C. 2409a(b) 21,22

28 U.S.C. 2409a(c) 22

28 U.S.C. 2409a(d) 22,25

28 U.S.C. 2409a(f) 3,14,16,17,18,20,22,23,26,28,29

28 U.S.C. 2409a(g) 22

Submerged Lands Act, 43 U.S.C. 1301 et seq.

43 U S.C. 1301 9,23,31

43 U.S.C. 1311(a) 23,24

43 U.S.C. 1311(b) 24,25

Tucker Act, 28 U.S.C. 1346(a) 15,17

Miscellaneous:

M. Hale, De Jure Maris Et Brachiorum Ejusdem, Cap. IV (Circa 1867) 8

H.R. Rep. No. 215, 83d Cong., 1st Sess., reprinted in 1953 U.S. Code Cong. & Ad. News 1385 25

H.R. Rep. No. 1778, 80th Cong., 2d Sess., reprinted in 1953 U.S. Code Cong. & Ad. News 1415 25

H.R. Rep. No. 1559, 92d Cong., 2d Sess. reprinted in 1972 U.S. Code Cong. & Ad. News 4547 22

H.R. Rep. No. 1656, 94th Cong., 2d Sess. reprinted in 1976 U.S. Code Cong. & Ad. News 6121 33,34

Dig. Just

43.12.3 8

43.12.1.7 8

43.12.1.9 8

43.12.1.14 8

41.1.30.3 8

7.4.24 8

40.1.30.1 8

Inst. Just. 2.1.3

C. Wright, Handbook of the Law of Federal Courts, § 22 (3d ed. 1976) 32

14 Wright & Miller, Federal Practice & Procedure, § 3655 (1976) 31,32

STATUTES INVOLVED

In addition to 28 U.S.C. 2409a and 1346(f), set forth in Petitioners' Brief on pages 2 and 3, the following statutes are also relevant:

5 U.S.C. 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

43 U.S.C. 1301 provides in pertinent part:

> When used in this chapter—
>
> (a) The term "lands beneath navigable waters" means—
>
> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> * * * * * * *

43 U.S.C. 1311 provides in pertinent part:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
>
> (b) (1) The United States releases and relinquishes unto said States and person aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;...
>
> * * * * * * *

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, Secretary of Agriculture *Et Al.*,
Petitioners,

vs.

THE STATE OF NORTH DAKOTA, *Ex Rel.*
BOARD of UNIVERSITY and SCHOOL LANDS,
Respondents.

On Writ Of Certiorari To The
United States Court of Appeals For
The Eighth Circuit

BRIEF OF THE RESPONDENTS

STATEMENT

This action was commenced by the respondent, the State of North Dakota (hereafter "the State") in federal district court on October 31, 1978. About one year earlier, State authorities learned that both the United States and the State had been issuing oil and gas leases to the bed of the Little Missouri River — the federal government since 1955, and the State since 1962 or earlier.[1] Notice of this dual leasing had not come to the attention of the appropriate State authorities before 1977 because no production had occurred that necessitated a determination of true ownership of the riverbed.

---

[1]Old State leasing records have not been completely retained and preserved in the State's archives.

Before production begins, oil and gas developers are primarily concerned about having all potential owners under lease. Thus, oil and gas developers commonly buy "protective" leases from any potential owner. Since there was doubt about the navigability of the Little Missouri River and hence the ownership of the riverbed, oil and gas developers obtained "protective" leases from both the State and from riparian owners, including the United States. This dual leasing has occurred for over 20 years. Because the State received lease applications and successfully sold leases at public auction, it had no reason to know of leasing by the federal government. But in the mid-1970's, several oil and gas developers raised the issue of ownership because leasing costs had greatly increased and because drilling had begun on lands near and along the Little Missouri River. Once drilling and production occur, ownership must be settled so that any royalties may be properly paid.

The State therefore filed suit in federal district court, seeking a declaratory judgment that the Little Missouri is navigable and seeking injunctive relief against federal officials from interfering with the State's rights to the bed. The suit named Petitioners as defendants because they had issued leases to Little Missouri lands on behalf of the largest riparian owner, the United States.[2] The State asserted federal jurisdiction under 28 U.S.C. 1331 (federal question), sought a remedy under 28 U.S.C. 2201 (declaratory judgment), and claimed a waiver of sovereign immunity under 28 U.S.C. 1361 (mandamus) and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*). J.A. p. 6. Although the

---

[2] Most of the federal riparian lands are acquired lands, not public domain. Generally, the surface estate is managed by the United States Forest Service and the mineral estate is managed by the Bureau of Land Management. Most of these lands were purchased from private landowners pursuant to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010-1012, originally enacted in 1937. There are also substantial amounts of state-owned and privately-owned riparian lands along the Little Missouri River.

State has not abandoned these grounds,[3] at the direction of the district court, it amended its complaint to add an assertion of federal jurisdiction under 28 U.S.C. 1346(f), to claim a waiver of sovereign immunity under 28 U.S.C. 2409a (Quiet Title Act), and to claim the bed of the Little Missouri River. J.A. p. 13.

At a one-day trial on December 15, 1980, the State offered evidence that the Little Missouri River was navigable. The evidence included the report of a trapper who descended the river by canoe in 1804 with a load of furs, and met Lewis and Clark at the mouth of the river. Several other examples of commercial navigation were shown, including a report that Theodore Roosevelt had pursued boat thieves down the river in 1886, and a navigability study done in 1975 by the United States Army Corps of Engineers — a study concluding that the Little Missouri was in fact navigable. Tr. ii-iii.

The Petitioners submitted no evidence on the issue of navigability. Instead, they argued that the twelve year statute of limitations (28 U.S.C. 2409a(f)) barred the State from bringing the action under the Quiet Title Act. The Petitioners suggested that the State had more than twelve year's notice of the claim of the United States because beginning in 1955 a few scattered federal leases, which are formally available to the public, had included small portions of the Little Missouri riverbed. Petitioners also argued that North Dakota officials should have read advertisements published in 1962 in the *Montana Oil Jour-*

---

[3]See Respondent's Conditional Cross-petition for Writ of Certiorari, No. 82-132. The State also filed a cross-appeal to the Eighth Circuit contending that its initial assertion of jurisdiction was proper and correct.

nal for the competitive leasing of five riparian oil and gas parcels that included portions of the bed of the Little Missouri.[4]

The District Court did not address the Petitioners' evidence on this point; it ruled that the statute of limitations contained in the Quiet Title Act did not apply to a State seeking to quiet title to its sovereign public trust lands, such as the beds of navigable lakes and streams. The District Court further declared that the Little Missouri River had been a navigable river when North Dakota became a state, Petition App. C, p. 21a & Petition App. D, p. 29; and that title to the bed vested in the State of North Dakota at statehood. Petition App. C., p. 21a and 25a.[5]

The Court of Appeals affirmed, finding that the Little Missouri River was navigable when North Dakota entered the Union. Petition App. A. p. 13a. The Court of Appeals also affirmed the District Court's ruling that the statute of limitations in the Quiet Title Act does not apply to states seeking to protect their title to sovereign public trust lands. *Id.* at 9a.

---

[4]In addition, the petitioners offered two letters written to the State. Neither letter was written by a person having authority to claim the riverbed on behalf of the United States (one was written by a private attorney); the letters were addressed to state agencies that had no authority over riverbed lands at the times the letters were written; and neither letter specifically informed the State that the United States was claiming ownership of the riverbed. Finally, the letters were written before any genuine dispute existed; until oil and gas were discovered, the theoretically inconsistent claims of ownership had little practical effect.

[5]Portions of the Little Missouri River flow along and through the Fort Berthold Indian Reservation. The lower courts did not address title to these portions, nor does this brief.

SUMMARY OF ARGUMENT

1. This suit concerns a narrow class of legally unique lands, a class that has its origin in the rule that certain tidal lands were reserved for the King. After the Revolutionary War, the thirteen original states fell heir to the tidal lands previously owned by the Crown. As additional states joined the Union, the constitutional Equal Footing Doctrine assured these states ownership of similar lands within their borders. These lands — eventually defined to include all lands lying beneath navigable waters — are held by the states in trust, to be preserved for navigation, commerce, fishing, and the like. Sovereign public trust lands may not be alienated wholesale or otherwise used for purposes inconsistent with the trust.

The Petitioners in this case argue, however, that the State's sovereign public trust lands may be alienated inadvertently, that the trust may be forfeited to enforce a federal statute of limitations. A rule allowing the United States to acquire state public trust lands by operation of a statute of limitations runs counter to more than a century of Supreme Court decisions emphasizing that the Equal Footing Doctrine and the states' sovereign control over lands of this sort are protected against federal intrusion by the Constitution itself.

There is no need to decide in this case, however, whether Congress has the constitutional power to take sovereign public trust lands from a state by means of a limitations period or other forfeiture. At the very least, Congress should not be presumed to intend an action so inimical to principles of federalism in the absence of a clear legislative statement. Requiring a clear statement of Congress's intent to limit state control of public trust lands is consistent with this Court's rulings in eleventh amendment and spending power cases and with the longstanding rule that a statute of limitations does not run against a sovereign without a clear expression of legislative intent.

2. Viewed in this light, the limitations provision on which Petitioners rely is a weak reed.

a. Even if the Quiet Title Act, 28 U.S.C. 2409a, offered the only available avenue for judicial relief, its limitations provision would not apply to the narrow class of suits brought by states to vindicate their title to sovereign public trust lands. Congress demonstrated no intent to cut off state remedies or to overturn the traditional rule that states are bound only by statutes of limitations that expressly include them. The statute and the legislative history are silent; such clues as may be found in the legislative history suggest no intent to bind States to the Act's statute of limitations. Without more, the statute must be construed in a manner consistent with principles of federalism.

b. In any event, the Quiet Title Act is not the only avenue by which a suit of this sort may be brought. The Act is a waiver of federal sovereign immunity; it expands the opportunity to sue the United States by name. The twelve year limitations period contained in the Act is at most a condition on the Act's waiver. It does not limit suits made possible by other exceptions to sovereign immunity. The Petitioners argue that the Act is the only applicable exception. If this were so, then before enactment of the Quiet Title Act, the states' right to control their sovereign public trust lands would have been wholly unenforceable; sovereign immunity would have barred any suit to prevent federal interference with those lands.

i. This remarkable notion is wrong. A recognized exception to the doctrine of sovereign immunity permits injunctive suits against federal officers who have interfered with property rights in violation of the Constitution. Petitioners' efforts to take control of the State's sovereign public trust lands violate the constitutional principles of federalism and state sovereignty embodied in the Equal Footing Doctrine. The State has sought prospective injunctive relief to prevent future acts in violation of these principles; it has not sought damages, a disgorging of

past lease fees, or other retrospective relief. Thus, this suit has a basis quite independent of the Quiet Title Act and quite free of the Act's limitations period. Nothing in the Act or the legislative history suggests an intent to limit this independent basis for suit.

ii. Similarly, the 1976 amendments to the Administrative Procedure Act waive sovereign immunity for all injunctive actions against the United States unless some other statute "expressly or impliedly forbids the relief that is sought." 5 U.S.C. § 702. Petitioners contend that the Quiet Title Act expressly or impliedly bars this action; in fact, neither the Act nor its history contains a hint that Congress intended to forbid relief in a case of this sort.

ARGUMENT

1. Application Of The Statute Of Limitations Represents An Unwarranted Intrusion On The Long-Established Constitutional prerogatives Of The States

It was established as early as 1842 that the thirteen original states own the beds of navigable tidal waters within their borders. *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367 (1842).[6] Three years later, the rule was extended by the "Equal Footing Doctrine" to all states.[7] *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). In *Weber* v. *Board of Harbor Commissioners*, 85 U.S. 57 (1873) this Court stated:

> Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters.

---

[6]The Court in *Martin* held that tidal and submerged lands beneath navigable waters passed from the British Crown and vested in the original thirteen states after the American Revolutionary War. The states did not surrender these lands to the federal government under the Constitution; these lands were reserved, subject only to the paramount right of the federal government to protect navigation.

State ownership of the beds of navigable waters can be traced to Roman law. *See Dig. Just.* 43.12.3; as well as 43.12.1.7; 43.12.1.9; 43.12.1.14; 41.1.30.3; 7.4.24; 40.1.30.1. *See also Inst. Just.* 2.1.3. Under English common law, title to the foreshore was considered *prima facie* in the king. *M. Hale, De Jure Maris Et Brachiorum Ejusdem*, Cap. IV (Circa 1867).

[7]This doctrine provides that states admitted to the Union have the same sovereignty, jurisdiction, and absolute title over sovereign lands as do the original states because they were admitted on an "equal footing" with the original states. *See United States* v. *Texas*, 339 U.S. at 716 (1950), and *Shively* v. *Bowlby*, 152 U.S. at 26-31 (1894).

Id. at 65-66. Somewhat later, this Court expanded State sovereignty to cover the lands beneath all navigable waters, whether tidal or not. *See Barney* v. *Keokuk*, 94 U.S. 324 (1876); *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443 (1881).

Numerous efforts to expand federal control over these lands have been turned back, both by the Supreme Court, *see*, e.g., *Pollard's Lessee* v. *Hagan*, *supra*, and by the Congress. *See* Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*[8] After statehood, this Court has held, the federal government has no authority to transfer these lands. *Goodtitle* v. *Kibbe*, 50 U.S. (9 How.) 470, 478 (1850). Even before statehood, the federal government holds these lands only "in trust for the future States." *Shively* v. *Bowlby*, 152 U.S. 1, 49 (1894).[9]

Indeed, after statehood the lands are still "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452 (1892). This means that a state may not surrender its public trust lands wholesale to others. While a few parcels may be conveyed for purposes consistent with the trust, "[a] grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." *Id.* at 453.

---

[8]The statehood Enabling Act for North Dakota expressly provides that the State enters into the Union on an "equal footing" with the original states. Enabling Act, ch. 180, § 7, 25 Stat. 676 (1886).

[9]*See also Montana* v. *United States*, 450 U.S. 544 (1981) (suit by United States on behalf of the Crow Tribe concerning land supposedly granted them under treaty presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States).

The states' authority to administer this trust is a valued "attribute of the sovereignty of the State." *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903). State control of these lands is protected against federal interference not only by the Tenth Amendment's guarantee of federalism,[10] but also by the constitutional Equal Footing Doctrine. As stated in *Oregon ex rel. State Land Board* v. *Cervallis Sand & Gravel Co.*, 429 U.S. 363 (1977):

> [U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned.

Id. at 374 (1977).

Once these lands have passed to the state at statehood under the Equal Footing Doctrine, they are governed by state law: "if the lands at issue did pass under the equal footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions." *Id.* at 378.[11] Federal law is ordinarily

---

[10] *See National League of Cities* v. *Usery*, 426 U.S. 883 (1976); *Fry* v. *United States*, 421 U.S. 452, 457 n.7 (1975); *Metcalf & Eddy* v. *Mitchell*, 296 U.S. 514, 523 (1926).

[11] The United States cites *Lassen* v. *Arizona Highway Dep't*, 385 U.S. 458 (1967), for the proposition that lands *granted* to the states by Congress are "equally 'sovereign' lands held in trust." This misses the point. The long line of equal footing doctrine cases, *supra*, and the state land grant cases (e.g., *Utah* v. *Andrus*, 446 U.S. 500 (1980); *Lassen, supra; Ervien* v. *United States*, 251 U.S. 41 (1919)) do not deal with similar subjects. Congressional land grants were made by Acts of Congress and carved out of property that was once federal public domain, and would have remained public domain but for the grants. The right of Congress to place conditions on grants of such lands has long been recognized, as has the right of the federal government to see that any conditions are honored. *Lassen, supra*, at 585. In contrast, the constitutional Equal Footing Doctrine vests states automatically with title to the beds of navigable waters.

inapplicable: "the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." *Id.* at 370-71.

There is no doubt that the bed of the Little Missouri passed to the state under the Equal Footing Doctrine. Two lower courts have found that the Little Missouri River was navigable at statehood. Petitioners did not challenge that finding in the questions they presented to this Court; thus, it must stand.

For this reason, one would expect state law, including the state statute of limitations, to govern the substance of disputes over the disposition of the Little Missouri riverbed. The law of North Dakota is entirely adequate to resolve the present dispute; it provides that title to these lands is held in trust for the public, *United Plainsmen Association* v. *North Dakota State Water Conservation Commission,* 247 N.W.2d 457, 461 (N.D. 1976), and it underscores the importance of that trust by prohibiting the use of adverse possession to divest the State of public lands: "No claim for the occupation, cultivation, or improvement of any public lands shall ever be recognized." N.D. Const. Art. IX, § 9.

Petitioners, however, urge that Congress overrode these provisions in 1972 when it enacted the Quiet Title Act. 28 U.S.C. § 2409a. By reason of this Act, Petitioners contend, lands that the State lacks authority to convey voluntarily can be stripped away without the State's consent or even its knowledge. If this were so, the states' regulation of land titles within its boundaries — one of the most traditional and integral of State functions — would be severely disrupted as the facts of this case demonstrates. Many private owners still hold land along the Little Missouri River. The federal government acquired most of its lands along the Little Missouri by purchasing the lands from other private landowners. If Petitioners' arguments were

adopted, federal landowners would hold the Little Missouri riverbed free from State claims. Private landholders, in contrast, would be required to treat the Little Missouri as a navigable stream whose riverbed belongs to the State, for private landowners cannot claim the special privilege of imposing a statute of limitations upon the State. And this patchwork of trust and non-trust lands would not be the worst of the confusion; that would come later, when currently private lands would be acquired by the federal government and when currently private lands would be sold or leased by the federal government to private parties who cannot claim the benefits of the Quiet Title Act's limitations provision. Whether the protection of the Quiet Title Act's limitation period extends to such acquisitions is a question that would require new waves of litigation.

While one may doubt Congress's power to cause such mischief in an area traditionally reserved to the states, the Court need not reach that question in this case. A close look at the Quiet Title Act is enough. In interpreting federal statutes that appear to trench deeply on state prerogatives, this Court has required that Congress express an unmistakable intent to do so. Thus, where Congress has not expressly subjected states to federal damages liability, this Court has refused to find a waiver of the states' Eleventh Amendment immunity. *See, e.g., Employees* v. *Department of Public Health & Welfare,* 411 U.S. 279 (1973) (federal law authorizing suit for double damages against "any employer" did not authorize damages suits against states). In another context, this Court declared that, while Congress may use its spending power to induce states to follow the federal lead, "if Congress intends to impose a condition on the grant of public moneys, it must do so unambiguously." *Pennhurst State School & Hospital* v. *Halderman,* 451 U.S. 1, 17 (1981).

In other contexts close to the present case, this Court has also demanded unambiguous language before it would divest states

of their authority over public lands. For example, as discussed below, the Court has held that statutes of limitation do not ordinarily run against a state unless expressly made applicable to it. *See, e.g., Weber* v. *Board of Harbor Commissioners,* 85 U.S. 57, 70 (1873). Moreover, in deciding whether other kinds of federal actions, such as conveyances made before statehood, can divest a state of public trust lands, this Court has refused to infer divestiture "unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank,* 270 U.S. 49, 55 (1926); *see also Martin* v. *Waddell,* 41 U.S. (16 Pet.) 366, 410 (1842) (grants of public trust lands to be inferred only if "clear and especial words are used").

These principles were summarized most recently in *Montana* v. *United States,* 450 U.S. 544, 552 (1981). In discussing the authority of the United States to convey territorial lands beneath navigable waters, the Court noted a strong presumption against such conveyances:

> [B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government,... it will not be held that the United States has conveyed such land except because of "some international duty or public exigency"....A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States....

The Court held that this presumption was not overcome even by a treaty declaring that a particular Indian reservation "shall be . . . set apart for the absolute and undisturbed use and occupation" of the tribe, and that no non-Indians other than federal officials "shall ever be permitted to pass over, settle upon, or reside in" the reservation; this language was held insufficient to convey lands located beneath navigable waters within the reservation. *Id.* at 554-57.

As the next section demonstrates, when it enacted the Quiet Title Act, Congress expressed no intent to limit state control of sovereign public trust lands. In the absence of clear language demonstrating congressional intent to intrude so far upon state sovereignty, the Act's limitations provision should not be construed to forfeit the State's ability to protect these lands.

II.

THE LIMITATION PROVISION OF THE QUIET TITLE ACT MAY NOT BAR A STATE FROM ACTING IN ITS SOVEREIGN CAPACITY TO PROTECT ITS PROPERTY RIGHTS TO SOVEREIGN PUBLIC TRUST LAND.

A. The Limitations Provision Is Not Applicable To The State.

1. In seeking a Congressional authorization for the forfeiture they propose, the Petitioners begin with the familiar argument that the doctrine of sovereign immunity requires the consent of the United States before any suit may be brought against it. The State, in amending its original complaint, brought its action pursuant to the Quiet Title Act which contains a waiver of sovereign immunity by the United States. The Petitioners further assert that Congress may attach conditions (such as a statute of limitations) to any waiver of sovereign immunity and that these conditions must be strictly construed.[12]

The Petitioners argue that a statute of limitations[13] provision governs a sovereign state just as it would any ordinary citizen.[14]

---

[12]Pet. Br., p. 25.

[13]28 U.S.C. 2409a(f).

[14]The Petitioners cite a number of cases for the proposition that a statute of limitations is an enforceable condition to the waiver of sovereign immunity. Pet. Br.,p. 25. All of these cases, however, are easily distinguishable on the facts from the present action.

Pet. Br., p. 25-26. While that may be true in some instances, in this action the State is not acting as an ordinary citizen since it seeks to quiet title to sovereign public trust lands. Therefore, the rule *quod nullum tempus occurrit regi* is applicable.

Under the *nullum tempus* rule the defenses of statute of limitations and laches may not be asserted against a sovereign. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134 (1938). Further, in *Weber* v. *Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873), this Court ruled that "[s]tatutes of limitations are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Id.* at 70.

The Court explained the rationale for this rule: "The presumption [of rightful possession] to which the statute gives this effect extends ... only against *individual claimants;* their personal interest is supposed to be sufficient to induce vigilance in the enforcement of their claims. *It does not extend against the*

In *United States* v. *Kubrick,* 444 U.S. 111 (1979), a private individual sought monetary damages from the United States in an action brought under the Federal Torts Claims Act. 444 U.S. at 115. In *Soriano* v. *United States,* 352 U.S. 270 (1957), an individual Phillippine resident sought monetary damages from the United States under the Tucker Act. 352 U.S. at 271. Likewise, *Munro* v. *United States,* 303 U.S. 36 (1938), involved a claim against the United States by an individual citizen under the Tucker Act. 303 U.S. at 36-37.

Two other cases cited by the Petitioners, *Finn* v. *United States,* 123 U.S. 227 (1887) and *Kendall* v. *United States,* 107 U.S. 123 (1882), involved individual citizens suing the federal government for monetary claims in the United States Court of Claims. 123 U.S. at 227-28, 107 U.S. at 124. Finally, *Nichols* v. *United States,* 74 U.S. (7 Wall.) 122 (1868), involved a suit by an unhappy merchant for the refund of custom duties in the Court of Claims. 74 U.S. at 123.

All the cases cited by the Petitioners for the proposition that a statute of limitations is an enforceable waiver condition involved private individuals suing the federal government for *monetary* claims. This case, on the other hand, involves an action by a state acting in its sovereign capacity to protect its title to sovereign public trust lands.

State, which acts through numerous agents, having no such incentive to prosecute her claims." Id. (emphasis supplied). The application of this rationale alone makes the statute of limitations (28 U.S.C. 2409a(f)) inapplicable to the present action.

The Petitioners note that the Quiet Title Act makes no express mention of states as plaintiffs. The Petitioners correctly state that this omission should not exclude a state from claiming the benefits of the Quiet Title Act, just as this omission does not bar states from seeking relief under the Administrative Procedure Act or the Tucker Act. Pet. Br., p. 24. The State, however, has never argued that an Act must expressly mention a state before a state is subject to the Act. Nor does the *Weber* rule stand for this proposition. Rather, *Weber, supra,* held that *statutes of limitations* do not apply unless states are expressly included. 85 U.S. at 70. The case does not speak to entire Acts—such as the Quiet Title Act.[15]

---

[15]The Petitioners assert that every court, with the exception of the court below and one district court, has applied the limitations provision to a suit by a state against the United States. Pet. Br., p.26. The State, however, contends that these decisions are inapposite either because the statute of limitations was not specifically an issue or because the case is easily distinguishable on the facts.

United States v. *Louisiana,* 127 U.S. 182 (1888), involved a monetary claim by the State of Louisiana for five percent of the net proceeds from the sale of federal land by the federal government. 127 U.S. at 182. Moreover, Louisiana's right to the proceeds of the sale did not arise from any sovereign title in Louisiana but rather under a congressional act which was enacted in order to provide swampland reclamation and road construction funds for the developing states. *Id.* at 182-83. Also, the statute of limitations, Rev. Stat. § 1069 (1887) (repealed 1911), applied in *Louisiana,* was a general statute limiting the jurisdiction of the Court of Claims. In this case, however, the applicable statute, 28 U.S.C. 2409a, *et seq.,* limits causes of action rather than court jurisdiction to hear those actions. Court of Claims jurisdiction is limited to *claims,* usually monetary damages, against the United States. See 28 U.S.C. 1491. The State in the present action is seeking to protect its title to sovereign public trust lands by enjoining the Petitioners from interfering with the State's exercise of its

The Court of Appeals properly noted that "special implications" relating to the applicability of Section 2409(a)(f) existed in this case because the State brought suit in its sovereign capacity rather than its proprietary capacity to protect its sovereign ti-

---

sovereign rights to this land. The State is not litigating a claim for money damages. Therefore, this suit would be outside the jurisdiction of the Court of Claims primarily because an injunction is sought and not because the six-year limitations bar of the present day equivalent of §1069, 28 U.S.C. 2501, applies. *Louisiana,* therefore, is simply inapposite since no title to sovereign trust land was in dispute nor was the statute of limitations applied to a sovereign state attempting to protect those lands.

In *California* v. *United States,* 132 F. Supp. 208 (Ct.Cl. 1955), the Court stated that the six-year statute of limitations under the Tucker Act applied to a state. *Id.* at 211. However, the Court's jurisdiction was based on the Tucker Act and this suit, like *Louisiana,* was also brought to recover a monetary claim. Significantly, in *California,* the United States possessed a recorded deed to the land in question. California challenged the validity of the United States' deed based on the principle that the adverse possession doctrine does not apply as against a sovereign state. *Id.* at 209. California did not, however, challenge the validity of the statute of limitations as applied to the state. In the present suit, on the other hand, North Dakota seeks to protect its title to its sovereign land rather than press a claim for monetary damages. Also, no deed nor body of subsequent law exists in the present case showing any color of title in the United States.

In *Park County, Montana* v. *United States,* 626 F.2d 718 (9th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981), the District Court and Court of Appeals agreed that the limitations provision of the Quiet Title Act applied to Park County because it had failed to show that it enjoyed a different status from other litigants under 28 U.S.C. 2409a(f). *Id.* at 720. However, in the present case it is a sovereign state acting in its sovereign capacity which is seeking to avoid the limitation of Section 2409a(f). A sovereign state has a fundamentally different status than a county, which is not a sovereign but is merely a creature of a state having a status much like a corporation. As such, counties do not possess the same privileges and immunities as sovereign states. See, e.g., *Quern* v. *Jordan,* 440 U.S. 332 (1979); *Monell* v. *Dep't. of Social Services of New York,* 436 U.S. 658 (1978); *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

tle to public trust lands. Petition App., p. 5a. See discussion of the Equal Footing Doctrine, Part I, *supra*. Because the State's title to these public trust lands is conferred by the Constitution,

---

Also, *Park County* was a suit by a county claiming a road easement within the boundaries of a national forest, not a suit to protect title to sovereign public trust lands. Therefore, it is clear that the State of North Dakota, unlike Park County, enjoys a status different from other litigants under Section 2409a(f) when it acts as a sovereign seeking to protect its title to public trust lands. The court below did not reject the holding in *Park County*, but merely distinguished it from this case based on the fundamentally different lands and plaintiffs involved.

As to *Nevada* v. *United States*, 628 F.2d 1357 (9th Cir. 1980)(table), *cert. denied*, 450 U.S. 995 (1981), the decision is unpublished and therefore it has no value as authority for any proposition of law. The *Nevada* decision came out of the Ninth Circuit where, under Rule 21(c) of the United States Court of Appeals for the Ninth Circuit, a decision "which is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders . . . ." Therefore, the Nevada decision has no precedential value in the Ninth Circuit. The Eighth Circuit also disclaims any precedential value in unpublished opinions. See Petition App. A, p. 9a.

Even if *Nevada* had any value as authority, the case is inapposite because the United States claimed the land in question as Indian land. The Quiet Title Act specifically excepts "trust or restricted Indian lands" from the waiver of sovereign immunity. 28 U.S.C. 2409a(a). In *Nevada*, the suit was dismissed on this basis. As an alternative ground, the Court of Appeals stated that the suit was also barred by the twelve-year statute of limitations. However, this was mere dicta because the State of Nevada did not challenge the applicability of Section 2409a(f) to its claim.

Finally, *United States* v. *422,978 Square Feet of Land*, 445 F.2d 1180 (9th Cir. 1971), is distinguishable for two reasons. First, California sought monetary compensation under the Tucker Act for the land taken by the United States. *Id.* at 1188. Second, the United States seized the land in this case for navigational purposes. *Id.* at 1186. Therefore, this case does not involve a sovereign state seeking to protect its title to public trust lands. Furthermore, the federal government has never claimed in the present action that it seeks title to the land in issue for navigational purposes.

these lands have a fundamentally different character than lands merely held in a proprietary capacity by a state or the federal government. *Illinois Central R.R.* v. *Illinois,* 146 U.S. 387, 452-55 (1892).

The federal title asserted by the Petitioners, in contrast, is largely based on its purchase of riparian lands from private landowners. The State, on the other hand, brought this action in its sovereign capacity pursuant to the constitutional Equal Footing and Public Trust Doctrines; this capacity is established by the unique character of the lands involved.

This Court has stated that "waivers by Congress of governmental immunity . . . should be liberally construed" when the federal government is acting in a proprietary capacity. *Federal Housing Administration* v. *Burr,* 309 U.S. 242, 245 (1940). See also, *National City Bank of New York* v. *Republic of China,* 348 U.S. 356, 359 (1951); *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 550 (1951). The State asserts that just such a liberal construction of the sovereign immunity waiver is required in this action.

The Petitioners claim that the present controversy involves two unequal sovereigns. Pet. Br., p. 27. The Petitioners argue that the federal government is acting as a superior sovereign in this action because it seeks to invoke a statute of limitations defense as a condition to a sovereign immunity waiver. The Petitioners, however, ignore the capacity of the parties. In this controversy, the State, based on the Equal Footing Doctrine, Public Trust Doctrine, and Submerged Lands Act, is the party acting in a sovereign capacity (protecting sovereign public trust lands) while the Petitioners are fulfilling merely a federal proprietary function (managing acquired federal land for multiple use). Indeed, this action does involve two unequal sovereigns; a sovereign state acting in its sovereign capacity and the Federal

Government merely acting in its proprietary capacity.[16] Therefore, the applicable rule in this action is drawn from *Weber, supra,* and *United States* v. *California,* 332 U.S. 19 (1947) that where "public trust" lands are concerned, a sovereign cannot be barred by laches or statute of limitations from suing to assert or protect title. *Weber,* 85 U.S. at 71; *California,* 332 U.S. at 39-40.

Because North Dakota, acting in its sovereign capacity, is seeking to quiet title to its constitutionally conferred public trust lands, the statue of limitations provision, Section 2409a(f), of the Quiet Title Act does not apply in this action.

2. The Petitioners assert that the applicability of the Quiet Title Act to this controversy is an all or nothing proposition. They assert that the State is not uniquely free to discard the burdens of the Act while claiming its privilege. Pet. Br., p. 28. The Petitioners, however, ignore both the statutory organization of Section 2409a and the legislative history of the Act. A basic rule of statutory construction is that a statute should be read as a whole, with effect given to each of its parts whenever possible. E.g., *Weinberger* v. *Hynson, Westcott & Dunning, Inc.* 412 U.S. 609, 631-32 (1973).

---

[16]The Petitioners cite *Sanitary District of Chicago* v. *United States,* 266 U.S. 405 (1925), for the proposition that a dispute between the United States and a state is a dispute between unequals. Pet Br., p. 27. The issue in *Sanitary District* was whether the State of Illinois could divert water from Lake Michigan in a manner that threatened the viability of the Great Lakes System. 266 U.S. at 423-24. In resolving the issue in favor of the federal government, this Court stated that the United States was "asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction." *Id.* at 425. The State realizes that the United States has broad powers under the Commerce Clause of the Constitution and paramount power to protect the right of public navigation. In the present action, however, neither the Petitioners nor the United States has made a claim to the Little Missouri River based on a navigational servitude or the Commerce Clause; indeed, in such instance, one would expect Petitioners and the United States to advocate a ruling of navigability. Rather, in this case, the federal government's interest in the river is purely proprietary and nonregulatory.

Section 2409a(a) of the Quiet Title Act is a general waiver of sovereign immunity by the United States with exceptions as to trust or restricted Indian lands. In the following subsections, however, the focus of the statute turns from the United States to the party bringing the suit. The State agrees that each of the following subsections is a limitation on the United States' waiver to suit. But each of these limitations must be construed separately. Based on this statutory organization and seemingly separate focus of the different subsections it is entirely reasonable that a sovereign state be included under the general waiver of immunity subsection while it need not be included under the other subsections.

For example, §2409a(b) provides that if the final determination in a suit brought under the Quiet Title Act is adverse to the United States, the United States may nevertheless retain possession of the real property involved upon payment of just compensation to the displaced party. Petitioners assert that this subsection also applies to states. Pet. Br., p. 32. If so, this subsection silently overrides the traditional rules that states hold constitutionally derived title to the beds of navigable waters and that the United States merely held pre-statehood title in trust for future states and their citizens. In *Montana* v. *United States,* 450 U.S.544 (1981), this Court discusses the established exception to the equal footing doctrine that allows Congress to convey territorial trust lands below navigable waters. *Id.* at 551, citing *Shively* v. *Bowlby,* 152 U.S.1, 48. Under this narrow exception, Congress is presumed to convey this trust land only to meet "some international duty or public exigency." 450 U.S. at 552. It follows that any application of §2409a(b) which would allow the United States to retain possession of state sovereign public trust lands upon mere payment of just compensation would be contrary to this presumption unless such retention of possession was based on some specific international duty or public exigency. Petitioners have not demonstrated any international duty, public exigency,

or unambiguous statement of Congressional intent to override state authority over sovereign public trust land.[17]

In Subsections 2409a(b), (c), (d), and (f) references are made to the following: "person," Subsection 2409a(b); "plaintiff," Subsection 2409a(c), (d), and (f); and "predecessor in interest," Subsection 2409a(f). No such references are made in Subsection 2409a(a). Therefore, since a logical division occurs between the general waiver of sovereign immunity under Subsection 2409a(a) and the specific conditions of the waiver listed in Subsections 2409a(b)-(g), and since Subsections 2409a(b), (c), (d), and (f) refer to three different parties, this Court should consult the legislative history of the statute in order to determine the application of each separate subsection.

The legislative history of Section 2409a(f), H.R. Rep. No. 92-1559, refers to "persons," "citizens," and "individual citizens" but it does not at any point refer to "states." H.R. Rep. No. 1559, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4547, 4547-52. In a relevant situation, this Court has stated that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 667 (1979), citing *United States* v. *Cooper Corp.,* 312 U.S. 600, 604 (1941). Although these cases involved the construction of statutes, there is no reason why this principle should not apply to legislative histories as well. Also, this Court has noted the absence of references to states in a legislative history and has stated that "[w]e can only conclude that this silence on the matter is itself a significant indication of legislative intent. . . . ." *Quern* v. *Jordan,* 440 U.S. 332, 343 (1979).

---

[17]Section 2409a(b) refers to "persons" which, in common usage, does not include the sovereign. *See Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 667 (1979). Therefore, §2409a(b) clearly does not include a sovereign state.

Significantly, the Quiet Title legislation itself is the result of a title dispute between a private landowner and the United States. *California* v. *Arizona,* 440 U.S. at 67, n. 7. Furthermore, as originally drafted, Section 2409a(a), the sovereign immunity waiver, stated that "[t]he United States may be named a party in any civil action brought by *any person* to quiet title to lands claimed by the United States." *Id.* (emphasis supplied). The "any person" phrase was subsequently deleted. The deletion of this phrase is evidence of congressional intent to include the states in the waiver of sovereign immunity subsection (2409a(a)). Therefore, since the legislative history of Section 2409a(f) refers specifically to "persons," the statute of limitations itself was intended by Congress to cover only stale claims by private individuals and not state claims to sovereign public trust lands. This is especially true when the Equal Footing Doctrine and the Submerged Lands Act are considered in this analysis.

The Petitioners refuse to accept the Court of Appeals' conclusion that the Submerged Lands Act is relevant to the present discussion of congressional intent. Pet. Br., p. 28 n. 18. The State, however, asserts that the Submerged Lands Act, including its legislative history, is particularly germane to this analysis. Because the legislative intent of Congress to quiet the title to submerged lands in the states is specifically expressed in the Submerged Lands Act, 43 U.S.C. 1311(a), any attempted reading of the Quiet Title Act to cut short the effect of the Submerged Lands Act and reverse that congressional intent is necessarily relevant to the present controversy.

Congress, by enacting the Submerged Lands Act of 1953, 43 U.S.C. 1301, *et seq.*, confirmed the states' title to the beds of in-

land navigable waters. *Corvallis,* 429 U.S. at 371, n. 4[18] The federal government's policy regarding the beds of navigable waters within state boundaries is stated in Section 1311(a) of the Act. This section provides that "[i]t is determined and declared to be in the public interest that . . . title to and ownership of lands beneath navigable waters, . . . [including] the natural resources within such lands, . . . are . . . recognized, confirmed, established, and vested in and assigned to the respective states. . . ." 43 U.S.C. 1311(a). Section 1311(b) of the Act quitclaims all

---

[18]In *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313 (1973), this Court states that "[the Submerged Lands] Act merely *confirmed* the states' preexisting rights in the beds of the navigable waterways within their boundaries by, in effect, quit claiming all federal claims thereto." *Id.* at 318 (emphasis supplied). Surely, it would be inconsistent for Congress to reaffirm state title to these lands and then nineteen years later, by enacting the Quiet Title Act, foreclose a state's right to assert title to these lands.

In *California ex rel., State Lands Commission* v. *United States,* ___ U.S. ___, 102 S.Ct. 2432 (1982) this Court alludes to the proposition that while the Submerged Lands Act *confirmed existing* state title to land beneath inland waters based on the Equal Footing Doctrine, the Act actually *granted* state title to land underlying territorial seas within three miles of state coastal boundaries. 102 S.Ct. at 2438. This *granting* of title to coastal submerged land was held to be a constitutional exercise of Congress' power to dispose of federal property. *See Alabama* v. *Texas,* 347 U.S. 272, 273-74 (1954). In *California ex rel., Lands Comm'n,* this Court adhered "to the principle that federal *grants* are to be construed strictly in favor of the United States." ___ U.S. ___; 102 S.Ct. at 2440, citing *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 235 (1960) (emphasis supplied). This principle, however, should have no application to a state seeking to protect its title to sovereign public trust lands within its boundaries. Such lands were not *granted* by Congress to the states, but rather, under the Equal Footing Doctrine, were vested in the states by the Constitution upon their admission to the Union.

"right, title, and interests of the United States" in such land to the respective states.[19]

The motivating factor behind the enactment of the Submerged Lands Act was to end the interminable litigation[20] between the federal and state governments over the title to these submerged lands. See H.R. Rep. No. 215, 83d Cong., 1st Session *reprinted in* 1953 U.S. Code Cong. & Ad. News, 1385, 1386. In other words, the immediate purpose of the Submerged Lands Act was to turn the management of the beds of navigable waters over to the states once and for all.[21] Yet, the Petitioners are seeking a

---

[19]Section 1311(b)(1) states in part, "[t]he United States releases and relinquishes unto said States . . . all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources. . . ." *Id.* This language could constitute a disclaimer of interest within the meaning of 2409a(d). *See, W.H. Pugh Coal Co.* v. *United States,* 418 F. Supp. 538 (E.D.Wis. 1976), where the court held that a quit claim deed constituted such a disclaimer.

[20]It is indeed ironic that Congress' avowed purpose in enacting the Submerged Lands Act was to once and for all confirm and establish the rights and claims of the states to the land and resources beneath navigable waters within their boundaries. It was Congress' intention that the "highly developed, experienced, and efficient state organizations" controlling the submerged oil deposits not be destroyed by transferring such resources to the control of a federal bureau. H.R. Rep. No. 1778, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. Code & Cong. Ad. News 1415, 1435. Yet once again this suit finds state and federal bureaus in litigation over the control of these same oil and gas resources.

[21]H.R. Rep. No. 215, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Ad. News 1385, 1389, states in part that "[t]he United States relinquishes unto said states . . . all rights, titles, interest . . . to all these lands, moneys, improvements, and natural resources. All claims arising out of past operations in this area are released by the United States." *Id.* A logical implication from this statement is that Congress also intended to release all *future* claims of the United States to these lands. At the very least, this clear expression of congressional intent shows that Congress did not anticipate that the United States would lay claim to any interest in these lands in the future other than within the federal constitutional power to regulate and control these lands. Examples of this federal power are commerce, navigation, national defense, international affairs, and flood control. *Id.* None of these powers have been invoked by the federal government in the present case.

construction of the Quiet Title Act that would clearly conflict with this express congressional intent. An application of Section 2409a(f) of the Quiet Title Act that would bar a state from asserting its title to its sovereign public trust lands would, in effect, allow the Petitioners to circumvent the provisions of the Submerged Lands Act and nullify the avowed congressional intent of that Act, which expressly disclaims United States' interests in the beds of navigable waters within state boundaries.

The Petitioners in this action are attempting to do indirectly what they cannot do directly. The Petitioners are attempting to defeat the legitimate claim of a sovereign state to its sovereign public trust land by administratively claiming such lands and then denying the state a forum for protecting its rightful title. To allow the Petitioners to hide behind this statute of limitations would deny meaning to the Submerged Lands Act, the Equal Footing Doctrine, and the Public Trust Doctrine.[22]

3. Should Section 2409a(f) of the Quiet Title Act govern this case, and should the State be unable to successfully defend

---

[22]In *United States* v. *Holt State Bank*, 270 U.S. 49 (1926), this Court stated that the United States' policy regarding territorial trust lands under navigable waters is to refrain from making any disposal of these trust lands except in "exceptional instances when impelled to particular disposals by some international duty or public exigency." *Id.* at 55. This exception to the Equal Footing Doctrine was severely limited by a strong presumption against withdrawal and conveyance of such land by the United States unless Congressional intent to convey or withdraw such lands was very plain. *Id. See also Montana* v. *United States, supra,* 450 U.S. at 552.

Allowing §2409a(f) of the Quiet Title Act to bar a state from asserting title to its public trust lands would, in effect, withdraw such trust lands not merely from a territory, but from an established sovereign state. These public lands would be withdrawn without any consideration of the strong presumption against conveyance or withdrawals and without any federal claim of overriding international duty or public exigency. Surely, Congress did not intend §2409a(f) to reach this far. *See also Goodtitle* v. *Kibbe, supra,* 50 U.S. at 478.

against the "notice" argument, the result would be a forfeiture of North Dakota's public trust lands and a divestiture of the State's title without an adjudication on the merits. Such a restrictive reading of the Quiet Title Act is precisely the kind of federal action impairing basic attributes of sovereign states that is prohibited by the Tenth Amendment as well as the Equal Footing Doctrine.

The Petitioners also assert that within its sphere, the Constitution requires that a dispute between the United States and a state be resolved in favor of the superior sovereign. Pet. p.27. This begs the real question because the United States is the superior sovereign only if it has title to the land. And it has title only if Congress intended to divest states of public trust lands by passage of a statute of limitations. There is no evidence that Congress had such an intent, and if there were, the intended result would be of doubtful constitutionality.

The Quiet Title Act should be read so as to avoid such doubts. For example, this Court, in *California* v. *Arizona*, 440 U.S. 59 (1979), construed the jurisdictional condition in 28 U.S.C. 1346(f) so as to allow the states to bring original actions under section 2409a in the Supreme Court despite the contrary wording of subsection 1346(f). *Id.* at 66-68. In so construing the jurisdictional condition this Court saved the statute and avoided the constitutional problems a more mechanical reading would have caused.[23] This case calls upon this Court to construe another subsection of the Quiet Title Act (2409a(f)) so as save the statute from a constitutional confrontation. This may be done by simply affirming the statutory construction of the lower courts.

---

[23]In *California* v. *Arizona*, this Court stated that when the constitutionality of a statute is challenged "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 440 U.S. at 66, *citing Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The Petitioners suggest that an "odd" result would occur if Section 2409a(f) were construed to bar a state *statutory* claim to property but not a state *constitutional* claim. If so, the solution should be to resolve the conflict by restricting sovereign immunity; this solution was adopted by Congress in recent amendments to the Administrative Procedure Act (discussed in Part B. below). In any event, the only issue before the Court here is a constitutional claim under the Equal Footing Doctrine. The unauthorized action of a few executive branch officers seeking to assert federal authority over the bed of a navigable river violated the constitutional entitlements of the State.

B. There Are Independent Grounds For Jurisdiction

The petitioners have jointly and severally interfered with the State's sovereign title to the bed of the Little Missouri River. The State secured a declaratory judgment of navigability under 28 U.S.C. § 2201. As previously stated, the issue of navigability is a federal question giving federal courts subject matter jurisdiction under 28 U.S.C. § 1331. *United States* v. *Oregon*, 295 U.S. 1 (1935). This action alone established title in the State; the petitioners, having failed to appeal that portion of the judgment, are forclosed from disputing the same. In addition, the State secured an order requiring the petitioners to cease and desist from interfering with the State's title. Where a federal question is raised such an action is clearly permissible under 5 U.S.C. §702 and under court decreed exceptions to the sovereign immunity doctrine.[24]

---

[24] *Jaffee* v. *United States*, 592 F.2d 712 (3rd Cir. 1979), *cert. denied*, 441 U.S. 961 (1979), *See also, Sheehan* v. *Army and Air Force Exchange Services*, 619 F.2d 1132, *reh'g denied*, 627 F.2d 239 (5th Cir. 1980), *rev'd on other grounds*, ___ U.S. ___, 102 S.Ct. 88 (1982); *Warin* v. *Dep't. of Treasury*, 672 F.2d 590 (6th Cir. 1982); *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1448 (1982); *Hill* v. *United States*, 571 F. Supp. 1098 (9th Cir. 1978); *City & County of Denver* v. *Bergland*, 517 F. Supp. 155 (D. Col. 1981); *University of Maryland* v. *Cleland*, 516 F. Supp. 448 (D. Md. 1981);

The declaratory judgment of navigability confirmed that the State was granted absolute title to the bed of the Little Missouri at statehood in 1889 pursuant to *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), under the Equal Footing Doctrine.[25] The Petitioners offered no evidence to dispute navigability and have not appealed that ruling. Yet the only legal, equitable, or moral claim through which the Federal government could claim title would be if the river were not navigable. The real dispute concerns a tortious interference with the State's use and enjoyment of its property; title is not in dispute and need not be quieted under 28 U.S.C. § 2409. Instead, the State wishes to enjoin Federal officers from interfering with the State's property; thus, the issue is possession, not title. The State contends that any necessary waiver of sovereign immunity apart from the Quiet Title Act is established by existing case law, by 28 U.S.C. §1361 (mandamus), and/or by 5 U.S.C. §702 (judicial review provisions of the Administrative Procedure Act).[26]

Collyard v. *Washington Capitals*, 477 F. Supp. 1247 (D. Minn. 1979); and *Illinois, ex rel. Scott* v. *Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977) (navigable waters). The federal defendants have argued that relief is not available under 5 U.S.C. 702 because of the language forbidding relief "if any other statute that grants consent to sue expressly or implicitly forbids the relief which is sought." The federal defendants cite the statute of limitations found in 28 U.S.C. 2409a(f) (Quiet Title Act) as such a statute. This argument is erroneous because the original action was not an action to quiet title, but was an action for a declaratory judgment of navigability; the issue of navigability is a federal question.

Several courts have held that 28 U.S.C. 1361 (mandamus) provides a waiver of sovereign immunity to force a federal official to perform a duty owed the plaintiff—in this case the duty is not to interfere with the State's property. *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976); *Roaring Springs Assoc.* v. *Andrus*, 471 F.Supp. 522 (D. Or. 1978); *NAACP* v. *Levi*, 418 F.Supp. 1109 (D.D.C. 1976).

[25] *See, supra*, Part I of the text for discussion of the Equal Footing Doctrine.

[26] Of course, by way of its previous arguments, the State contends that such waiver is not needed. See text *supra* Part I.

Application of the doctrine of sovereign immunity to suits for specific relief has been conflicting, and "as a matter of logic it is not easy to reconcile all of them."[27] *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). However, the landmark case of *United States* v. *Lee*, 106 U.S. 196 (1882), established the proposition that if the possession of the agent of the United States was illegal, the suit against such agents was not a suit against the sovereign; thus, the doctrine of sovereign immunity was not applicable to bar the action. *Id.* at 220-23. This general proposition was narrowed in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1948). The Court distinguished *Lee* and its progeny, holding that:

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within these powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Id. at 701-02.

This rule was applied in *Malone* v. *Bowdoin*, 369 U.S. 643 (1961), again distinguishing *Lee*, finding continuing validity "where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation." *Id.* at 648, *quoting Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 697. Because respondent made no assertion of a constitutional claim, no assertion that the official was exceeding his delegated powers, or no assertion that he was possessing land in anything other than his official capacity, the suit was dismissed on the grounds that sovereign immunity barred the action. *Id.* at 648.

---

[27] "The result of course is a condition of hopeless confusion in judicial opinions, and an invitation to Government attorneys to assert the applicability of the doctrine whenever the opportunity reasonably presents itself." *Knox Hill Tenants Council* v. *Washington*, 448 F.2d 1045, 1059 (D.C. Cir. 1971).

In the present case, the State claims that the Petitioners have interfered with the State's constitutionally conferred title to sovereign lands. In addition, Petitioners' actions are beyond any statutory authority given them by Congress as there is no statute permitting Petitioners to interfere with the State's ownership of the beds of navigable waters. *See, Andros* v. *Rupp.*, 433 F.2d 70 (9th Cir. 1970). Indeed, an Act of Congress, the Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, necessarily implies a congressional mandate not to interfere with the State's title to sovereign public trust lands. Even under the strictest interpretation of the jurisdictional tests in *Larson* and *Malone*, federal courts may decide the merits of this controversy over a defense of sovereign immunity.[28]

As stated in *Larson*, a basic exception to the doctrine of sovereign immunity arises when a federal officer's actions "conflict with the terms of his valid statutory authority." *Larson*, 337 U.S. at 695. 14 Wright and Miller, *Federal Practice and Procedure*, § 3655, at 186-213 (1976); *Doe* v. *United States Civil Service Commission*, 483 F.Supp. 539 (S.D.N.Y. 1980). In *Andros* v. *Rupp*, 433 F.2d 70 (9th Cir. 1970), the Court looked to the individual or entity in whom title was vested. The Court held that since title was in the plaintiff, the sovereign had no statutory authority to control the property. *Compare Malone* v. *Bowdoin*, 369 U.S. 643 (1961); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949), (distinguished as cases where record title was in the sovereign).[29] Further, the Court stated that

---

[28]Petitioners cite *McClellan* v. *Kimball*, 623 F.2d 83 (9th Cir. 1980)(Pet. Br., p. 23) as denying this theory; however, in that case the court held that the federal official was bound by federal regulations. The Petitioners also cite *Cummings* v. *United States*, 648 F.2d 289 (5th Cir. 1981). This case stands solely for the proposition that one cannot sue the United States in state court when seeking to quiet title.

[29]Here "record title" is not in the United States—not even by implication of being a riparian owner since the Little Missouri River was meandered at the time of the cadastral survey (with the exception of one township). See Defendants' Exhibits D and G, District Court

statutory authority need not be shown to indicate that the defendant had exceeded his powers, for "we know of no statute saying that a government official shall not take private property." 433 F.2d 972. The Court continued "[t]he defendant as a supervisor of property belonging to the United States does not, by definition, have authority to control property which does not belong to the United States." *Id.* at 72. In a similiar case, *Armstrong* v. *Udall,* 435 F.2d 38 (9th Cir. 1970), the circuit court remanded the case for a determination of whether the land in question was included in a patent. Applying *Andros,* the court said that if private title could be shown an action would lie. *Id.* at 42. *See also, Zager* v. *United States,* 256 F.Supp. 396 (D. Wis. 1966).

Professor Wright has stated:

> When property rights of the government are challenged, the Court, despite strong scholarly criticism, is now firmly committed to the doctrine that suits, though in form against the officer, are in reality against the United States and thus barred by sovereign immunity, *except in the unlikely circumstance that the officer named as defendant is exceeding his statutory powers in holding the property or that his statutory powers are constitutionally void.*

C. Wright, *Handbook of the Law of Federal Courts,* §22 at 84, (3rd. Ed. 1976) (*emphasis added) See also,* 14 Wright & Miller, *Federal Practice and Procedure,* §3655 at 180-184 (1976). The State submits that this case constitutes the "unlikely circumstance"—a federal officer exercising privileges of owner-

---

Record. Since the petitioners have not appealed the decree of navigability, "record title" is now clearly in the State. Moreover, record title should be deemed to be in the State prior to judgment by virtue of the Equal Footing Doctrine and Submerged Lands Act.

ship over a navigable river bed without statutory authority and in defiance of the Equal Footing Doctrine of the Constitution.[30]

In addition to the above case law interpreting sovereign immunity as it applies to specific relief, Congress amended 5 U.S.C. §§ 702 and 703 by Pub.L. 94-574, 90 Stat. 2721 (1976). The legislative history of this provision gives great insight into the reasoning behind the amendment.

After reviewing *Larson* and other leading cases, the House Report concluded:

> The application of sovereign immunity is illogical and one cannot predict in what case the injustice is likely to occur. . . . [T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity. . . . [When the defense is raised,] the sovereign immunity doctrine distracts the court's attention from the basic issue concerning the availability or scope of judicial review.[31]

The House Report states that this amendment was intended "to eliminate the defense of sovereign immunity as to any action in a Federal Court seeking relief other than money damages and stating a claim based on the assertion of unlawful official

---

[30]*See, Larson,* 337 U.S. at 695. *See generally, Andrus* v. *Charleston Stone Products Co.,* 436 U.S. 604, 608, n. 6 (1978); *Doria Mining & Eng'g Corp.* v. *Morton,* 608 F.2d 1255, 1257 (9th Cir. 1979), *cert. denied sub nom., California* v. *Doria Mining & Eng'g Corp.,* 445 U.S. 962 (1980); and *Fort Sumter Tours, Inc.* v. *Andrus,* 564 F.2d 119, 1123, n. 4 (4th Cir. 1977). The fact that this action seeks declaratory and injunctive relief does not prevent it from being maintained. *See, e.g. United States* v. *Lee,* 106 U.S. 196 (1882); *American Federation of Government Employees, Local 1858* v. *Callaway,* 398 F. Supp. 176 (N.D. Ala. 1975); *Lombard Corp.* v. *Resor,* 321 F. Supp. 687 (D.D.C. 1970).

[31]H.R. Rep. No. 1656, 94th Cong., 2d. Sess. 8-9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6121, 6128—30.

action ..." H.R. Rep. No. 1656, 94th Cong., 2nd Sess., 2 reprinted in 1976 U.S. Code Cong. & Ad. News 6121, 6122." *Warin* v. *Director, Department of the Treasury*, 672 F.2d 590 (6th Cir. 1982), held that "the amended 5 U.S.C. § 702 operates as a waiver of the sovereign immunity defense under [28 U.S.C. §1331]." *Id.* at 591. That Court agreed with other circuits that "have concluded that 5 U.S.C. §702 waives the sovereign immunity defense in actions for monetary relief under section 1331."

It should be noted that 5 U.S.C. §702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief. Petitioners argue that the Quiet Title Act, 28 U.S.C. 2409(a), "expressly or impliedly forbids the relief that is sought." Pet. Br. at 24-29. As stated earlier, the actual title to property is not in dispute; that is merely incidental to the real dispute — the Petitioners' interference with the State's right to use and enjoy sovereign public trust land. The State merely seeks to enjoin Petitioners from interfering with such right. As such, the statute of limitations provision of the Quiet Title Act does not apply to limit §702 in this action. Moreover, the intent of the limiting language is §702 may be aimed at statutes that specifically and affirmatively mandate complete sovereign immunity. The congressional intent of §702 was to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a federal agency or official acting in an official capacity."[11] Thus, sovereign im-

[11]It was stated in *Schnapper* v. *Foley*, 667 F.2d 102 that "application of *Larson* [should not] be considered in light of the amendments to 5 U.S.C. §§ 702 and 703. . . ." *Id.* at 107. *Warin* v. *Director, Department of the Treasury*, 672 F.2d 590 (6th Cir. 1982), *citing Jaffee* v. *United States*, 592 F.2d 712 (3rd Cir. 1979), *cert. denied*, 441 U.S. 961 (1979); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Sheehan* v. *Army & Air Force Exchange Services*, 619 F.2d 1132 (5th Cir. 1980), *reversed on other grounds*, ___ U.S. ___, 102 S. Ct. 88 (1982).

[12]H.R. Rep. No. 1656, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6121, 6129-30.

munity is waived in this case and the injunction should be granted. Even in the absence of §702, prior case law regarding sovereign immunity allowed suits for specific relief against federal agents acting beyond the scope of their authority when interfering with private or state property. Clearly §702 was intended to expand the rights of plaintiffs and to limit the sovereign immunity doctrine. Disallowing the State's claim on the basis of the conditions in §702 would restrict rather than expand the pre-amendment exception to the sovereign immunity doctrine. This would constitute a restriction which Congress did not intend.

CONCLUSION

The judgments below (that the Little Missouri River is navigable, that the State may not be foreclosed by the sovereign immunity doctrine from protecting its property rights to the riverbed, and that the Petitioners may be enjoined from interfering with those rights) should be affirmed.[34]

Respectfully submitted,

ROBERT O. WEFALD
Attorney General

OWEN L. ANDERSON
Special Assistant
Attorney General &
Counsel of Record
UND School of Law
Grand Forks, N.D. 58202
(701) 777-2961

---

[34]Petitioners have asked that the judgments of navigability be vacated. This is inappropriate as the Petitioners have not appealed that portion of the lower court judgments. Clearly, the federal courts have subject matter jurisdiction (28 U.S.C. 1331) to decide that issue. Moreover, *based on the Petitioners' argument,* there is no need to vacate that portion of the lower court judgments in order to *bar* the State's assertion of title and its right to protect same. It is in the public interest that the public's right to navigate the river be recognized as against all landowners—both public and private. Although it may not be binding on nonparties to this litigation, the judgment of navigability is an important step in defending the public right of navigation. Moreover, the judgments of navigability should be vacated only if the statute of limitations governs this case *and if* such statute has run. This latter fact has not yet been proven.

JOHN STEVEN CLARK
Attorney General of the
State of Arkansas

RICHARD S. GEBELEIN
Attorney General of the
State of Delaware
J. CALVIN WILLIAMS
Deputy Attorney General

JIM SMITH
Attorney General of the
State of Florida

MICHAEL J. BOWERS
Attorney General of the
State of Georgia

TANY S. HONG
Attorney General of the
State of Hawaii

DAVID H. LEROY
Attorney General of the
State of Idaho

TYRONE C. FAHNER
Attorney General of the
State of Illinois

THOMAS J. MILLER
Attorney General of the
State of Iowa

WILLIAM J. GUSTE, JR.
Attorney General of the
State of Louisiana
GARY L. KEYSER
Assistant Attorney General

FRANK J. KELLEY
Attorney General of the
State of Michigan
LOUIS J. CARUSO
Solicitor General

WARREN SPANNAUS
Attorney General of the
State of Minnesota

MICHAEL T. GREELY
Attorney General of the
State of Montana

RICHARD H. BRYAN
Attorney General of the
State of Nevada

IRWIN I. KIMMELMAN
Attorney General of the
State of New Jersey

ROBERT ABRAMS
Attorney General of the
State of New York

JAN ERIC CARTWRIGHT
Attorney General of the
State of Oklahoma

DAVE FROHNMAYER
Attorney General of the
State of Oregon

LEROY S. ZIMMERMAN
Attorney General of the
Commonwealth of
Pennsylvania

DENNIS J. ROBERTS II
Attorney General of the
State of Rhode Island

DANIEL R. MCLEOD
Attorney General of the
State of South Carolina

MARK V. MEIERHENRY
Attorney General of the
State of South Dakota
ROXANNE GIEDD
Assistant Attorney General

JOHN J. EASTON, JR.
Attorney General of the
State of Vermont
JOHN H. CHASE
Assistant Attorney General

KENNETH O. EIKENBERRY
Attorney General of the
State of Washington

A. G. MCCLINTOCK
Attorney General of the
State of Wyoming

Attorneys for Amici Curiae

QUESTIONS PRESENTED

1. May the States' retained sovereign title to the beds of navigable waterways be transferred to the federal government by operation of a federal statute of limitations?

2. Did Congress clearly intend that the limitations provision of 28 United States Code section 2409a be applicable where States are asserting ownership of sovereign lands reserved to them under the Constitution?

3. Is the Quiet Title Act applicable at all to an action against federal officers to restrain their tortious interference with a State's sovereign property rights in the bed of a navigable waterway?

TABLE OF CONTENTS

	Page
Questions presented	i
Interest of the amici curiae	1
Summary of argument	5
Argument	8
I. A statute of limitations enacted by Congress cannot deprive a state of its constitutionally reserved sovereign trust lands	8
A. Where a state is suing to protect its sovereign title in a navigable waterway, it may not be barred by a federal statute of limitations premised on an assumed immunity from suit	10
B. Regardless of the proffered justification, Congress may not transfer a state's sovereign land title through the device of a statute of limitations	15
II. At the very least, Congress must speak clearly and unequivocally if it means a statute of limitations to apply to the states' sovereign trust title in the beds of navigable waterways	21
III. Section 2409a(f) applies only to actions brought under the Quiet Title Act; it does not apply to actions against federal officers such as this one	23
Conclusion	29

TABLE OF AUTHORITIES CITED

Cases

Page

Ames v. Kansas (1884) 111 U.S. 449 15
Andros v. Rupp (9th Cir. 1970) 433 F.2d 70 ..... 25, 26
Armstrong v. Udall (9th Cir. 1970) 435 F.2d 38 26
Borax, Ltd. v. Los Angeles (1935) 296 U.S. 10 ..... 12, 25
Börs v. Preston (1884) 111 U.S. 252 15
California v. Arizona (1979) 440 U.S. 59 ..... 3, 13, 14, 20, 21, 22
California ex rel. State Lands Commission v. United States (1982) ..... U.S. ....., 102 S.Ct. Rptr. 2432 ..... 13, 14
Carr v. Moore (Iowa 1903) 93 N.W. 52 ..... 17, 18
Cincinnati v. Louisville & Nashville R.R. Co. (1912) 223 U.S. 390 8
City of Berkeley v. Superior Court (1980) 26 Cal.3d 515 (162 Cal.Rptr. 327, 606 P.2d 263) 22
City of Long Beach v. Mansell (1970) 3 Cal.3d 462 (91 Cal.Rptr. 23, 476 P.2d 423) 17
Collector v. Day (1870) 78 U.S. (11 Wall.) 113 8
Commonwealth of Puerto Rico v. United States (D. P.R.) No. Civ. 80-2079-C.C. 4
Coyle v. Oklahoma (1911) 221 U.S. 559 8
Crowell v. Benson (1932) 285 U.S. 22 21
Cummings v. United States (5th Cir. 1981) 648 F.2d 289 28
Federal Energy Regulatory Commission v. Mississippi (1982) ..... U.S. ....., 102 S. Ct. Rptr. 2126 9
Hardin v. Jordan (1891) 140 U.S. 371 9
Hawaii v. Gordon (1963) 373 U.S. 57 ..... 11, 13, 25, 27
Illinois Central Railroad v. Illinois (1892) 146 U.S. 387 ..... 9, 16, 21
Justheim v. McKay (D. D.C. 1954) 123 F. Supp. 560 25
Kansas v. United States (1907) 204 U.S. 331 ..... 10, 13
Land v. Dollar (1947) 330 U.S. 731 ..... 13, 20, 23
Lane County v. Oregon (1868) 74 U.S. (7 Wall.) 71 8

Table of Authorities Cited

Cases

Page

Larson v. Domestic & Foreign Corp. (1949) 337 U.S. 682 ..... 23, 24, 25, 26, 27, 28
Lassen v. Arizona Highway Dept. (1967) 385 U.S. 458 11
McClellan v. Kimball (9th Cir. 1980) 623 F.2d 83 28
Malone v. Bowdoin (1962) 369 U.S. 643 ..... 24, 25, 26, 27, 28
Martin v. Waddell (1842) 41 U.S. (16 Pet.) 366 9
Massachusetts v. New York (1926) 271 U.S. 65 ..... 9, 10
Massachusetts v. United States (1978) 435 U.S. 444 ..... 8, 9, 13
Minnesota v. Hitchcock (1902) 185 U.S. 373 13
National League of Cities v. Usery (1976) 426 U.S. 833 ..... 9, 19
Nebraska v. Iowa (1972) 406 U.S. 117 3
New Mexico v. Lane (1917) 243 U.S. 52 ..... 11, 13
New Orleans v. United States (1836) 35 U.S. (10 Pet.) 662 ..... 18, 19
New York v. United States (1946) 326 U.S. 572 ..... 9, 19
Oklahoma v. Texas (1922) 258 U.S. 585 25
Oregon v. Hitchcock (1906) 202 U.S. 60 ..... 11, 13, 15
Park County, Montana v. United States (9th Cir. 1980) 626 F.2d 718 16
People v. Kerber (1908) 152 Cal. 731 (93 Pac. 878) 17, 18
People of the State of California v. United States (Ct. Cl. 1955) 132 F.Supp. 208 16
Pollard's Lessee v. Hagan (1845) 44 U.S. (3 How.) 212 9
Price v. Magnolia Petroleum Co. (1925) 267 U.S. 415 15
Principality of Monaco v. Mississippi (1934) 292 U.S. 313 12
Ritter v. Morton (9th Cir. 1975) 513 F.2d 942 ..... 13, 20, 26
Shively v. Bowlby (1894) 152 U.S. 1 9

TABLE OF AUTHORITIES CITED

CASES

	Page
Sloan Shipyards Corp. v. United States Fleet Corp. (1922) 258 U.S. 549	28
State Land Board v. Corvallis Sand & Gravel Co. (1977) 429 U.S. 363	9, 10, 15, 19
State of California ex rel. State Lands Commission v. United States (N.D. Cal. 1981) 512 F. Supp. 36	4, 16
State of California ex rel. State Lands Commission v. Yuba Goldfields (E.D. Cal.) No. Civ. S-79-733 RAR	4
State of Louisiana v. Garfield (1908) 211 U.S. 70	13
State of North Dakota ex rel. Board of University and School Lands v. Andrus (8th Cir. 1982) 671 F.2d 271	22
State of North Dakota ex rel. Board of University and School Lands v. Andrus (D. N.D. 1981) 506 F. Supp. 619	4, 18
Underwater Storage, Inc. v. United States Rubber Co. (D.C. Cir. 1966) 371 F.2d 950	29
United States v. California (1947) 332 U.S. 19	1, 17
United States v. Clarke (1980) 445 U.S. 253	17, 28
United States v. Lee (1882) 106 U.S. 196	10, 23
United States v. Louisiana (1888) 127 U.S. 182	15
United States v. Mission Rock Co. (1903) 189 U.S. 391	9
United States v. Texas (1892) 143 U.S. 621	12, 14
United States v. Utah (1931) 283 U.S. 64	3
United States v. 422,978 Square Feet of Land (9th Cir. 1971), 445 F.2d 1180	16
Utah v. United States (D. Utah) No. Civ. C-79-0302J	4
Wallis v. Pan American Pet. Corp. (1966) 384 U.S. 63	25
Weber v. Harbor Commissioners (1873) 85 U.S. (18 Wall.) 57	17, 18, 22
Wilson v. Omaha Indian Tribe (1979) 442 U.S. 653	22

TABLE OF AUTHORITIES CITED

Page

Constitution

United States Constitution, article III, section 2, clause 2 15

Statutes

The Mineral Leasing Act of 1920 25
Mineral Leasing Act for Acquired Lands 24, 25
Quiet Title Act (86 Stat. 1176) ..... i, 1, 4, 7, 14, 20, 22, 23, 24, 29
5 U.S.C. Section 702 23
28 U.S.C.:
Section 1346(f) 14, 19, 21
Section 1402(d) 19
Section 2409a ..... i, 1, 4, 7, 26, 28, 29
Section 2409a(b) 11
Section 2409a(c) 19
Section 2409a(e) 19
Section 2409a(f) 2, 5, 6, 7, 14, 21, 22, 23
30 U.S.C.:
Section 181, et seq. 24, 25
Section 351, et seq. 24, 25
Section 352 25

Other Authorities

Annot. (1957) 55 A.L.R.2d 554 17
Hart & Wechsler, The Federal Courts and the Federal System (2d ed. 1973) 10, 11, 24
40 Op.Atty.Gen. 9 (1941) 25
7 Powell on Real Property (1982 ed.) 2, 18
Rest.2d Torts, § 161, com. b., § 899, com. d 29
Scalia, Sovereign Immunity and Public-lands Cases (1970) 68 Mich. L.Rev. 867 24
Statistical Abstract of U.S. (101st ed. 1980) 2, 3

No. 81-2337

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

JOHN R. BLOCK, Secretary of Agriculture, et al.,
Petitioners,

VS.

THE STATE OF NORTH DAKOTA, ex rel. BOARD OF UNIVERSITY AND SCHOOL LANDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, LOUISIANA, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, WASHINGTON, AND WYOMING ON BEHALF OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The issue here is whether the mere passage of time, when coupled with a bare claim of federal ownership that may have absolutely no basis, may work a transfer to the federal government of lands in the beds of navigable waterways that are owned in trust by the States by virtue of their retained sovereignty. Petitioners argue that 28 United States Code section 2409a clearly contemplates such transfer of state sovereign title. This extreme position would, if accepted, threaten widespread loss of state sovereign land title by a means that no one, including the federal government, would have thought possible prior to 1972, when the Quiet Title Act (86 Stat. 1176) was enacted. The case implicates the very substance of the constitutional compact whereby a residuum of sovereignty was not delegated by the States to the new national government but rather was retained by them as sovereigns.

Prior to the recent reliance by the federal government on the limitations provision of the 1972 Quiet Title Act, no one supposed that, as between the federal government and the States, title to the States' sovereign trust lands could be determined not by a suit on the merits, but by mere passage of time. This Court has frequently entertained such suits by the federal government under its original jurisdiction. Defenses based on laches or the statute of limitations have been rejected as inapplicable. (See *United States v. California* (1947) 332 U.S. 19, 39-40.) Further, the States had at their disposal suits against federal officers to enjoin wrongful use or possession of state lands in navigable waterways. Such suits often incidentally involved questions of title, but no statute of limitations was ever applied to bar such actions.

Now, for the first time, and based on the federal government's interpretation of a recent enactment that comes almost two hundred years after the adoption of the Constitution, the government is asserting that such a time bar can

transfer to it a State's sovereign title in navigable waterways, quite independent of the merit of the government's mere *claim* of ownership. The government's theory does not even require that its claim rise to the level of adverse possession, which can operate to transfer title to some types of land, given the passage of a prescribed time period (often as long as twenty years) *and* affirmative use of the property that is "actual, notorious, exclusive and continuous."[1] Rather, according to petitioners, a mere "claim" will suffice.

As is evident in the case at bar, petitioners' argument has a particularly draconian twist. Here, they argue that North Dakota was "on notice" of the federal claim in 1955, that the twelve-year limitation period of 28 United States Code section 2409a(f) ran in 1967, and that North Dakota was therefore barred from asserting its claim, even though this was some five years before Congress created what is allegedly the State's sole right to maintain the action. (Petitioners' Br. 34, 35.) This is hard law indeed. Can this be a correct statement of the law, at least as it relates to lands in the beds of navigable waterways, lands that the States claim by virtue of their retained sovereignty?

We submit that it cannot be correct. The extent of the waterways subject to possible federal claims is vast. By conservative estimate, there are 78,444 square miles (over fifty million acres) of land covered by inland waters in the fifty States.[2] The shoreline along tidal waterways alone totals an estimated 88,633 miles.[3] And the United States is by far the largest holder of littoral upland title along

---

[1]See generally, 7 Powell on Real Property (1982 ed.) ¶ 1013[1], pp. 91-11, 91-12, ¶ 1014.

[2]Statistical Abstract of U.S. (101st ed. 1980) table 354, p. 209. Notably, this figure does not include streams less than one-eighth of a mile in width, thus excluding the vast majority of navigable rivers and streams in this country. (*Id.*, at fn. 2.)

[3]*Id.*, table 355, p. 210.

such waterways. Including Indian lands administered in trust, the United States owns over 36 percent of the land in this country, some 822,000,000 acres, which is almost five times the land area of the State of Texas.[4] Just along tidal waterways, the United States is the owner of approximately 45,290 miles of shoreline, over one-half of the total.[5] Inland, its vast holdings are threaded with rivers and streams and dotted with lakes, many of them navigable and thus claimed as sovereign land by the States. Other potential title disputes lie waiting in tidal and freshwater marshes, where, unlike most rivers and lakes, the line between the waterway and the uplands is indistinct and difficult to locate.

The uncertain nature of title to the beds of navigable waterways further complicates the matter, for the problem is not merely one of the sheer magnitude of possible federal claims. As this case demonstrates, whether a waterway is "navigable" can be subject to conflicting factual assertions. Further, the States' retained sovereign title to submerged lands continually shifts with avulsion and accretion along the watercourses overlying such land. Rivers defy any attempt at imposing finality on adjudications of water boundaries along them. The Colorado river, for instance, which runs through or forms the boundary of the States of Arizona, California, Colorado, Nevada, and Utah, has frequently been the subject of litigation over title. (E.g., *United States v. Utah* (1931) 283 U.S. 64; *California v. Arizona* (1979) 440 U.S. 59.) And other rivers, such as the "fickle" Missouri, have "refused to be bound by a Supreme Court decree." (See *Nebraska v. Iowa* (1972) 406 U.S. 117, 119.) Every shift in a river's course can result in new "claims" by the federal government as littoral owner, thus continually eroding state sovereign title because all such "claims" may ripen into title, under the government's theory, with the mere passage of time.

---

[4] *Id.*, table 395, p. 237, table 397, p. 238, table 403, p. 241, table 354, p. 209.

[5] *Id.*, table 398, p. 237.

The unmanageable implications for the States of the petitioners' argument are manifest. It is simply not possible for the land agencies of the various States, with their small staffs and limited budgets, to comprehensively monitor the large number of federal title claims to these lands that may presently exist or that will undoubtedly arise in the future. Especially is this true where the claim need not be coupled with overt use and occupation, and no requirement exists that the State be directly and unequivocally notified of the claim. Many such claims may have been barred, under petitioners' theory, even before passage of the Quiet Title Act, even though, upon later examination, the waterway might be found to be navigable and hence owned by the State upon its admission to the Union.

In short, if applied over such a vast acreage to claims regarding a title that is inherently uncertain, the subject statute of limitations will have the necessary result of transferring hundreds of thousands of acres of the States' sovereign submerged lands to the federal government. And in federal ownership, the lands will have no special status as lands held for the citizens of the respective States under the common law trust that exists in navigable waterways owned by the States as sovereigns. The federal government will be free to dispose of such lands as it chooses, free of the constraints of the public trust doctrine.

The danger is not speculative. The asserted bar of section 2409a's limitation period has already been raised on numerous occasions against state sovereign land claims.[6] So far, where it has been squarely presented, the

---

[6]E.g., *State of North Dakota ex rel. Board of University and School Lands v. Andrus* (D. N.D. 1981) 506 F. Supp. 619; *State of California ex rel. State Lands Commission v. United States* (N.D. Cal. 1981) 512 F. Supp. 36; *State of California ex rel. State Lands Commission v. Yuba Goldfields* (E.D. Cal.) No. Civ. S-79-733 RAR; *Commonwealth of Puerto Rico v. United States* (D. P.R.) No. Civ. 80-2079-C.C.; *Utah v. United States* (D. Utah) No. Civ. C-79-0302J.

lower courts have resolved the question favorably to the States. But petitioners are now arguing in this Court that these cases are wrong.

Regardless of the force of petitioners' arguments when directed at the claims of private citizens, or even at the claims of the States when *sovereign* title is not at issue, these arguments must be rejected in the narrow situation presented here, where the States' retained sovereign trust title to the beds of navigable waterways is at stake. The United States Constitution requires it.

SUMMARY OF ARGUMENT

When the Revolution took place, the thirteen original States obtained title to the beds of navigable waterways as independent sovereigns and in trust for their people. When these States later adopted the Constitution, they delegated much of their sovereignty to the newly created federal government for the common good. However, a residuum of sovereignty was retained by the States. One major, undelegated element of sovereignty was the States' title to "sovereign" lands—the lands beneath navigable waterways. States later admitted to the Union also obtained title to the beds of navigable waterways, not by any grant from Congress, but by virtue of their status as sovereigns equal in stature to the original States under the Constitution. This sovereign title, never granted or otherwise delegated to the federal government, may not be lost through application of any rule of federal law.

Petitioners nonetheless contend that just such a federal rule operates to transfer title to state sovereign lands here. They contend that 28 United States Code section 2409a(f), a statute of limitations enacted by Congress with regard to quiet title actions generally, may be applied so as to transfer a State's title to sovereign trust land to the federal government.

After adverting to the special nature of the States' title to sovereign lands held in trust for their people, the court

of appeals determined that Congress had not intended to make the limitation period of section 2409a(f) applicable to a State when an issue of title to sovereign lands was presented. The twenty-eight amici States agree with the narrow determination of the court of appeals. But we will discuss as well the broader issues raised by petitioners below and before this Court.

1. Even assuming a congressional intent to include state sovereign land claims within the limitation period of section 2409a(f), any such intent could not be given effect.

a. Regarding the unique circumstance of a dispute between the federal sovereign and a sovereign State involving title to lands that the State claims by virtue of its retained sovereignty, a statute of limitations may not be defended as a condition to the waiver of sovereign immunity. In a clash between federal and state sovereigns over land in a waterway where the State grounds its claim on a retained sovereign right, "sovereign immunity" attaches to the federal government only if it is truly the superior sovereign. And in such controversies, the federal government is the superior sovereign only if it does indeed own the land. In such circumstances, the plan of the Constitution gives a right to either government to sue the other, in order to resolve the *threshold* question of whether ownership, and thus superior sovereignty, indeed lies with the federal government. To *assume* that the federal government owns the land in question, and therefore to conclude that it has sovereign immunity because it is the "superior sovereign", merely begs the question. Regarding title to the beds of their waterways, the States have at least a constitutional right of access to the courts, so that the question of which sovereign holds title, and hence the question of any federal sovereign immunity, may be answered by the courts, and not unilaterally by federal officials.

1. Regardless of the justification proffered, Congress may not, consistent with the retained state sovereignty over the beds of navigable waterways guaranteed in the Constitution, enact a rule that can work an alienation of a State's sovereign title. The States cannot lose the public's trust title in such lands by application of doctrines such as adverse possession, statutes of limitations, or equitable estoppel. This rule, recognized in both state and federal courts without exception, is inextricably bound up with the States' sovereign title. Again, the States are constitutionally entitled to access to the courts to obtain a determination on the threshold issue of ownership. If the State indeed owns the land as sovereign land, then as a matter of retained state sovereignty a federal statute of limitations may not be invoked to deprive it of title. Just as Congress may not constitutionally limit the jurisdiction of the Supreme Court in cases involving sovereign land title disputes, it may not constitutionally impose a statute of limitations that violates an element of state sovereignty reserved to the States as part of the compact by which the Constitution was adopted.

2. At minimum, given the grave constitutional problems presented by asserted application of a limitation period to the sovereign land claims of the States, a clear and unequivocal statement by Congress of the statute's application to the States is necessary. Section 2409a(f) contains no such congressional statement.

3. Neither the Quiet Title Act nor its statute of limitations is applicable here at all. The limitation period of section 2409a is applicable only to quiet title actions. It does not apply to suits to enjoin wrongful conduct of federal officers, which have long been sanctioned by this Court, even though such actions may sometimes incidentally involve federal land title claims. Such actions have a basis in law distinct and independent from actions to quiet title against the United States itself. Such actions

are particularly appropriate where title was never admittedly in the federal government and where the State's claim is to sovereign lands reserved to it under the Constitution. In an era when it has continually *cut back* the scope of sovereign immunity, Congress surely did not intend to *expand* the doctrine's reach by barring such independent actions against federal officers.

ARGUMENT

I. A STATUTE OF LIMITATIONS ENACTED BY CONGRESS CANNOT DEPRIVE A STATE OF ITS CONSTITUTIONALLY RESERVED SOVEREIGN TRUST LANDS

With the adoption of the Constitution, the States surrendered to the newly created national government much of the sovereignty that they had exercised as independent States. Their sovereignty was further limited by later adoption of the various Amendments. But it is also true that some elements of sovereignty were not delegated to the national government and instead were retained by the States. The Union "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty *not delegated to the United States by the Constitution itself.*" (Emphasis added.) (*Coyle v. Oklahoma* (1911) 221 U.S. 559, 567; accord, *Massachusetts v. United States* (1978) 435 U.S. 444, 455; *Collector v. Day* (1870) 78 U.S. (11 Wall.) 113, 124.)

Congress may not impair this undelegated sovereignty of the States. (*Coyle v. Oklahoma, supra,* 221 U.S. 559 (enabling act for creation of State may not prescribe location of state capital); *Cincinnati v. Louisville & Nashville R.R. Co.* (1912) 223 U.S. 390 (Northwest Ordinance of 1787 could not limit State's power of eminent domain); *Lane County v. Oregon* (1868) 74 U.S. (7 Wall.) 71 (State's power to tax).) This limitation on congressional power has been recognized even in situations where, unlike here, Congress has invoked against a State one of the powers expressly delegated to it by the Constitution. (See

National League of Cities v. Usery (1976) 426 U.S. 833, 842-845 (state sovereignty an implied limitation on the commerce power); *Massachusetts v. United States, supra,* 435 U.S. 444, and *New York v. United States* (1946) 326 U.S. 572, 582 (inter-governmental tax immunity); *Federal Energy Regulatory Commission v. Mississippi* (1982) ..... U.S. ....., 102 S. Ct. Rptr. 2126 (distinguishing *Usery*).)

One of the most important elements of the States' retained sovereignty is their title to the beds of navigable waterways, which are held in trust for the benefit of their people. State ownership of such lands derives from principles of the common law of England whereby the Crown held such lands, in trust, by virtue of its sovereign prerogative. (*Shively v. Bowlby* (1894) 152 U.S. 1, 11-13; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 435-437.) When the Revolution took place, the original States succeeded to such title as independent sovereigns, and that title was not granted or otherwise delegated by them to the new national government. (*Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 366, 410; *Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 212, 229-230.) Later-admitted States succeeded to this same title, not by virtue of any congressional grant, but by virtue of their status as sovereigns equal in stature to the original States under the constitutionally based equal footing doctrine. (*Pollard's Lessee, supra,* at pp. 223, 229-230; *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370, 373-374.)

This title in the States is an inherent attribute of their sovereignty. (*United States v. Mission Rock Co.* (1903) 189 U.S. 391, 404; *Hardin v. Jordan* (1891) 140 U.S. 371, 381.) "The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged. . . ." (*Massachusetts v. New York* (1926) 271

U.S. 65, 89.) Accordingly, this Court has ruled that a State's title to such land vests absolutely upon statehood and is not subject to later defeasance by operation of federal law. (*Corvallis, supra,* 429 U.S. at pp. 370-371, 374, 386.)

A. Where a State Is Suing to Protect Its Sovereign Title in a Navigable Waterway, It May Not Be Barred by a Federal Statute of Limitations Premised on an Assumed Immunity from Suit

We accept as a truism petitioners' statement that, "within its sphere, our Constitution gives the national Government ultimate supremacy." But to say, based on this premise, that the federal government is the "superior sovereign" and hence entitled to sovereign immunity from suit, is merely to suggest the relevant question here, not answer it. In the unique circumstance of a suit in which a State is claiming title to lands by virtue of its *retained sovereignty,* may it be *assumed* at the outset that the federal government is the "superior sovereign"?

We do not here challenge the general doctrine of federal sovereign immunity, or even its application to the States in situations other than the unique case here presented.[7] Where a citizen sues the United States, there is clearly only one sovereign, and immunity applies. Neither do we argue here that the conclusion is changed simply because the other party is a "sovereign" State. We note, for instance, that federal sovereign immunity has been recognized where a State's title claim derived solely from a congressional enactment regarding lands that were, at the

---

[7]It is nevertheless true that the theoretical underpinnings of the doctrine in this country are far from clear. (See *United States v. Lee* (1882) 106 U.S. 196, 205-207; Hart & Wechsler, The Federal Courts and the Federal System (2d ed. 1973) pp. 1339-1344.) Also uncertain is the basis for the general assertion in *Kansas v. United States* (1907) 204 U.S. 331, made without discussion, that a State may not sue the federal government without its consent. (See *Hart & Wechsler, op. cit. supra,* at p. 256.)

time of the enactment, concededly part of the federal public domain and could vest in the State only by congressional grant. (E.g., *Hawaii v. Gordon* (1963) 373 U.S. 57; *New Mexico v. Lane* (1917) 243 U.S. 52; *Oregon v. Hitchcock* (1906) 202 U.S. 60.) And, on the issue of sovereign immunity, we concede for purposes of argument that the doctrine applies to state claims under such congressional grants against the federal public domain where any state title would be impressed with a "trust". (See *Lassen v. Arizona Highway Dept.* (1967) 385 U.S. 458 (lands granted to a State "in trust" for educational purposes).)[8]

But the situation is different where a State sues to protect its retained sovereign title to the bed of a navigable waterway. If indeed the State owns the land as a sovereign, and not the federal government, the State is not contending with a "superior sovereign". Petitioners talk about title being "wrested" from the federal government and "transferred" to the State as a reason for invoking sovereign immunity here. (Petitioners' Br. 11, 20, 21.) This argument chases its tail. It *assumes,* pre-litigation, that the federal government holds title to the waterway. But if the State indeed owns the land by virtue of its retained sovereignty under the Constitution, the judgment will not "expend itself on the public domain." Whatever the propriety of the federal government's argument vis-à-vis a private

---

[8]Nor does a discussion of the special nature of the States' sovereign land title relate in any way to any federal power of direct or inverse condemnation of state sovereign lands pursuant to some power delegated to the federal goverment. (See Petitioners' Br. 18, 19.) Rather, we are dealing solely with a mere claim of title by a federal officer. If it is finally determined that the federal government doesn't own the land, that may be the end of it, for the government may elect not to condemn the land. (See Hart & Wechsler, *op. cit. supra,* at pp. 1374-1375.) But if the government wishes to acquire the land, only then might the federal eminent domain power come into play (see 28 U.S.C. § 2409a(b)), and then only if it were justified in furtherance of some power delegated to the federal government by the Constitution. That is another case.

citizen, it must be rejected where a State is asserting retained sovereign title to lands guaranteed it by the Constitution.

This is one of those rare situations in which the doctrine of sovereign immunity is rendered inapplicable by the very nature of the constitutional compact. (See *Principality of Monaco v. Mississippi* (1934) 292 U.S. 313, 322-323, 328-329; *United States v. Texas* (1892) 143 U.S. 621, 646.) *United States v. Texas* was an original action involving a dispute over the boundary between the Territory of Oklahoma and the State of Texas. The Court recognized the doctrine of sovereign immunity, but nonetheless held that the States had consented to such suits by the United States by virtue of the constitutional scheme:

> "The submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch v. State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty." (*Ibid.*)

The same underlying constitutional postulate applies here. If a State sues the federal government over land, asserting that its title derives from its retained sovereignty, the "superior sovereignty" of the federal government cannot be assumed. Rather, the State at least enjoys a right of access to the courts, implied under the plan of the Constitution, so that the courts, and not the United States, may determine the question of title,[9] and hence the question of whether superior federal sovereignty is implicated. The

---

[9]This Court has held that the federal government has no authority to unilaterally determine federal ownership claims regarding the sovereign lands of the States, and that such questions are committed to judicial resolution. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 16-19.)

federal government's consent to suit is inherent in the constitutional scheme.[10] In such a situation, determination of the threshold jurisdictional question will determine the merits as well, but there is nothing novel in that. (See *Land v. Dollar* (1947) 330 U.S. 731, 735; *Ritter v. Morton* (9th Cir. 1975) 513 F.2d 942, 945-946.)

None of the cases cited by petitioners impugn this conclusion. The bulk of them are irrelevant, because they were suits involving asserted state land entitlements that were based on dispositions by Congress of what was admittedly the nation's public domain. Any broad statements concerning the federal government's immunity from suit by the States were therefore not made with reference to state title claims to sovereign land, and must be limited to their context.[11] The only cited cases that deal even tangentially with the issue here presented are *California v. Arizona* (1979) 440 U.S. 59, and *California ex rel. State Lands Commission v. United States* (1982) ..... U.S. ....., 102 S.Ct. Rptr. 2432, and in neither of these cases did the Court decide the question.

The precise issue decided in *California v. Arizona* was a narrow one: did Congress intend to deprive the Supreme Court of its original jurisdiction over cases to which a State was a party? The Court avoided the constitutional question that would have been presented had that been

---

[10]Cf. *Massachusetts v. United States, supra,* 435 U.S. at pp. 455, 459, recognizing that, despite the supremacy clause, the immunity of traditional state sovereign functions from the national taxing power is "implied from the States' role in the constitutional scheme." (*Id.,* at p. 455.)

[11]The following cases all dealt with claimed state entitlements to federal public domain lands under specific congressional enactments: *Kansas v. United States, supra,* 204 U.S. 331; *Oregon v. Hitchcock, supra,* 202 U.S. 60; *State of Louisiana v. Garfield* (1908) 211 U.S. 70; *New Mexico v. Lane, supra,* 243 U.S. 53; *Hawaii v. Gordon, supra,* 373 U.S. 57; *Minnesota v. Hitchcock* (1902) 185 U.S. 373.

the congressional intent by implying an exception to the provision in the Quiet Title Act which conferred "exclusive" jurisdiction on the district courts. The Court found this exception for cases where a State was the suing party despite the general language of 28 United States Code section 1346(f), which made no express exception for States. It is true that the opinion contains some general statements concerning sovereign immunity, but this may have been because the State did not challenge the validity of the limitations provision in the context of the hearing on its motion for leave to file the complaint. The Court itself noted that its own decision in *United States v. Texas, supra,* 143 U.S. 621—a federal-state boundary case—suggested a conclusion contrary to general statements and dicta in other cases regarding the question of sovereign immunity. (440 U.S. at p. 63.) In short, the Court was not liberally construing the statutory language to make the United States amenable to suit, but rather to avoid attributing an intent to Congress that would present a constitutional question regarding congressional power to curb the Court's original jurisdiction. In no way may the opinion's dicta concerning sovereign immunity be construed as a holding that the federal government is immune from suit by a State where a State's retained sovereign title to the beds of navigable waterways is involved.

California ex rel. State Lands Commission v. United States did nothing more than make passing reference in a footnote (..... U.S. ....., at fn. 6) to the dicta in *California v. Arizona* concerning federal sovereign immunity. The limitations provision of section 2409a(f) was not raised by the federal government. The question of asserted federal sovereign immunity concerning the state sovereign title claims involved was therefore not presented for decision.

We are left with the conclusion that a State, in this narrow situation, has a constitutional right of access to

the courts to sue the United States over its sovereign land title claims; and while Congress may make concurrent the jurisdiction that would otherwise be exclusive in this Court under article III, section 2, clause 2 of the Constitution (*Börs v. Preston* (1884) 111 U.S. 252; *Ames v. Kansas* (1884) 111 U.S. 449), it may not constitutionally deprive the States totally of this means of resolving such sovereign claims against contrary claims of the federal government, based on any theory of sovereign immunity.

B. Regardless of the Proffered Justification, Congress May Not Transfer a State's Sovereign Land Title Through the Device of a Statute of Limitations

The state legal principles designed to protect against loss of the States' sovereign trust title in navigable waterways are inextricably bound up with the States' constitutionally retained title to such lands. Congress may not constitutionally interfere with application of such principles. (See *State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. 363, 370-371, 374, 376.) Such principles certainly may not be displaced under the guise of "regularizing" the "procedure" for adjudication of such claims as between a State and the federal government. And we submit that Congress is so inhibited even if, contrary to the above discussion, consent to such suits is required.

For purposes of argument, we can make the following concessions. Congress can enforce statutes of limitations, even against the States, where the claim is one against monies in the federal treasury. (See *United States v. Louisiana* (1888) 127 U.S. 182, 185, 192.) Similarly, Congress could apply a statute of limitations against non-sovereign state title claims to land that was admittedly, at the time of the congressional enactment creating the asserted entitlement, part of the federal public domain. (*Cf. Oregon v. Hitchcock, supra*, 202 U.S. 60; *Price v. Magnolia Petroleum Co.* (1925) 267 U.S. 415 (congressional grants of federal public domain to States).) Perhaps, too, a time limit could be imposed on other types of state title claims,

as long as the claims were not based on the State's retained sovereignty in the beds of navigable waterways. (Cf. *Park County, Montana v. United States* (9th Cir. 1980) 626 F.2d 718 (claim by a *county* to a *road easement*).) And Congress might be able to impose a statute of limitations against state claims for just compensation following condemnation by the federal government in furtherance of some power specifically delegated to it, even where the money claim was for the taking of a State's sovereign lands. (See *United States v. 422,978 Square Feet of Land* (9th Cir. 1971), 445 F.2d 1180, 1187-1189; *People of the State of California v. United States* (Ct. Cl. 1955) 132 F.Supp. 208, 211.)

We assert, however, that a generally applicable statute of limitations regarding title disputes cannot be applied against a State's claim of title to sovereign submerged lands where state law regarding such lands prohibits loss of the State's title through mere passage of time. (See *State of California ex rel. State Lands Commission v. United States* (N.D. Cal. 1981) 512 F.Supp. 36, 45.)

The principle that statutes of limitations do not run against lands in which a State has sovereign trust title is well established. This Court has recognized the special nature of the States' inherent sovereign trust title:

> "[I]t is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State . . . ." (*Illinois Central Railroad v. Illinois, supra,* 146 U.S. 387, 452.)

"The trust with which [such lands] are held therefore, is *governmental and cannot be alienated,*" except in extremely narrow circumstances. (Emphasis added.) (*Id.,* at pp. 455-456.)

Accordingly, under state law established to protect state title to sovereign trust land, it is the rule in many States that statutes of limitations do not run against the State regarding such land. (E.g., *People v. Kerber* (1908) 152 Cal. 731, 733-734 [93 Pac. 878]; *Carr v. Moore* (Iowa 1903) 93 N.W. 52, 54-55; accord, *Weber v. Harbor Commissioners* (1873) 85 U.S. (18 Wall.) 57, 68, 70; Annot. (1957) 55 A.L.R.2d 554, 585-589; cf. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493, 499-501 [91 Cal.Rptr. 23, 476 P.2d 423] (ordinary principles of estoppel do not apply).) The rationale for the rule has been set forth by this Court in a title dispute over this very type of trust land:

> "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act." (*United States v. California* (1947) 332 U.S. 19, 39-40.)

The reason for the rule applies with particular force here. The tremendous acreages to be monitored by state land officers and the elusive and shifting nature of land title in and along waterways have been noted earlier. If the statute of limitations applies here, it is virtually certain that the public's trust title in hundreds of thousands of acres of navigable waterways will be "forfeited" by state employees' "failure to act."[12]

---

[12]See also *United States v. Clarke* (1980) 445 U.S. 253, where this Court narrowly construed a federal statute providing that allotted Indian trust lands could be "condemned" by a State, holding

Kerber, *Carr*, and *Weber*, *supra*, all involved claims against a State based upon adverse possession, a doctrine of title acquisition that demands of the person claiming to be an adverse possessor that he engage in all manner of hostile, notorious, exclusive and continuous acts with regard to the subject property.[13] Still less should a statute of limitations be applicable against a State where, as here, it is asserted that the existence of a bare claim, alone, is sufficient with the passage of time to transfer a State's sovereign title to the federal government.[14] A separate adverse possession claim by the federal government was rejected by the district court below (506 F. Supp. at p. 624, fn. 8) and has not been pursued further. The government's assertion

---

that such lands were not subject to inverse condemnation. The Court noted that while direct condemnation proceedings require formal notice to the condemnee, inverse condemnation does not involve similar safeguards and shifts a considerable burden of discovery onto the federal government:

> "[I]n the case of Indian trust lands, which present the Government '"'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,'"' [citation omitted] the United States may be placed at a significant disadvantage. . . ." (*Id.*, at pp. 257-258.)

The burden on state officers is similarly great here, given the thousands of miles of navigable waterways subject to possible claims by the federal government as the littoral owner.

[13]See generally, 7 Powell on Real Property, *supra*, at ¶¶ 1012, 1013.

[14]In a similar context, and by way of contrast, this Court has declined to estop a city from asserting title to waterfront property held in trust as a common for its citizens, even in the face of long-term federal use and possession and of repeated congressional enactments, many at the solicitation of the city fathers, that had treated the property as part of the federal public domain. (*New Orleans* v.

of title is therefore based solely on a "claim" of title. At bottom, the thrust of the federal government's argument is that even the thinnest of federal claims, not even accompanied by physical use and possession, may, if unchallenged within the limitation period, work a transfer of title from a State to the federal government of sovereign trust lands.

Such a theory of sovereign land title transfer runs head-on into this Court's holding in *Corvallis, supra,* 429 U.S. at pp. 370-371, 374, 376, that a State's title to the beds of navigable waterways vests absolutely upon statehood and is not subject to later defeasance by operation of federal law. This is merely another instance of the truism that, as a matter of constitutional law, Congress sometimes may not apply to the States the same law that it applies to private citizens. (*National League of Cities v. Usery, supra,* 426 U.S. 833, 845, 849; *New York v. United States, supra,* 326 U.S. 572, 586-588 (Stone, C.J., concurring).)

Because this principle of *Corvallis* is founded in the Constitution and not upon any congressional enactment, Congress may not abrogate it under the rubric of "regularizing" the "procedure" for quiet title suits. Congress may of course limit such suits to the federal courts (28 U.S.C. § 1346(f)), prescribe venue (28 U.S.C. § 1402(d)), require specific types of allegations in the complaint (28 U.S.C. § 2409a(c)), or provide that such cases shall be tried by a court without a jury (28 U.S.C. § 2409a(e)). Such provisions do not run afoul of the Constitution. But just as Congress, as a matter of "procedure" could not constitutionally deprive a litigant of due process by banning

---

United States (1838) 35 U.S. (10 Pet.) 662, 734, 735.) The Court held that the city could not lose such trust property, even to the United States, and even where a federal commission had previously rejected the city's title claim, based upon the errors of its officers:

> "[C]ity authorities . . . had not the power, by the acts referred to, to divest the city of a vested interest in this common." (*Id.*, at p. 735.)

cross-examination in such suits,[15] it cannot, as to state sovereign land title, constitutionally impose a statute of limitations. Such a provision cannot be defended as procedural. It is substantive in the most fundamental sense when it purports to transfer title to sovereign trust lands from a State to the federal government. Indeed, petitioners are arguing here that North Dakota was already foreclosed from suing in quiet title when the Quiet Title Act was enacted in 1972. (Petitioners' Br. 34, 35.) The word "procedural" is not so plastic as to cover the harsh substantive impact of such an argument.

In summary, imposition of a statute of limitations here would violate the allotment of sovereignty in the Constitution. If a State, and not the federal government, indeed owns the land in a waterway by inherent right of sovereignty, then the State, as a matter of retained sovereignty not delegated in the Constitution, is entitled to have its law applied; that is, that it cannot lose title to such trust land by operation of a statute of limitations. If, on the other hand, the federal government is the true owner, then the period of limitation is applicable. Again, only a threshold court determination of ownership can determine whether the action is subject to a statutory time bar. And again, though this would incidentally decide the merits of the case, there is nothing exceptionable in this. (Cf. *Land v. Dollar, supra,* 330 U.S. 731, 735; *Ritter v. Morton, supra,* 513 F.2d 942, 945-946.)

---

[15]See also *California v. Arizona, supra,* 440 U.S. 59, 66-67, which strongly suggests that Congress could not, in prescribing "procedure" under the Quiet Title Act, constitutionally limit the original jurisdiction of this Court.

II. AT THE VERY LEAST, CONGRESS MUST SPEAK CLEARLY AND UNEQUIVOCALLY IF IT MEANS A STATUTE OF LIMITATIONS TO APPLY TO THE STATES' SOVEREIGN TRUST TITLE IN THE BEDS OF NAVIGABLE WATERWAYS

From the foregoing, it is clear that grave constitutional questions are presented by the asserted application of the limitation period of section 2409a(*f*) to the sovereign land claims of the States. This Court has prescribed the rule of construction for such circumstances:

> "When . . . an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (*Crowell v. Benson* (1932) 285 U.S. 22, 62.)

This Court has invoked this canon concerning the very act at issue here in deciding that, despite the apparently all-encompassing language of 28 United States Code section 1346(*f*), Congress did not intend that section's conferral on the district courts of "exclusive original jurisdiction of civil actions under section 2409a" to apply to suits by a State against the federal government. (*California v. Arizona, supra,* 440 U.S. at pp. 67-69.)

This judicial caution is fortified by a parallel principle calling for strict construction of statutes that arguably authorize an abandonment of the public's trust rights in a State's sovereign land. For instance, the California Supreme Court, in applying the law concerning the common law public trust in navigable waterways enunciated by this Court in *Illinois Central Railroad v. Illinois, supra,* 146 U.S. 387, has stated:

> "[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; *and*

> *if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.*" (Emphasis added.) *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 528 [162 Cal. Rptr. 327, 606 P.2d 362].)

Accordingly, in avoidance of the grave constitutional questions concerning the power of Congress to apply section 2409a(f) to the title claims of the States to navigable waterways held in trust for their people by virtue of their retained sovereignty, we respectfully suggest that this Court should, at minimum, construe the limitations provision of the Quiet Title Act as not applying to such claims. If, to the contrary, Congress wishes the statute of limitations to apply in such circumstances, it should say so in clear and uncertain terms. This was the reasoning of the court of appeals in this case. (*State of North Dakota ex rel. Board of University and School Lands v. Andrus* (8th Cir. 1982) 671 F.2d 271, 275-276.)

Considerations independent of the sovereign nature of the States' title to the beds of navigable waterways support this result. The Quiet Title Act was prompted by a case involving a title dispute between a private person and the federal government (see *California v. Arizona, supra,* 440 U.S. at p. 68, fn. 7); Congress was acting with regard to title claims generally, and not with specific reference to state title claims. This fact, coupled with the failure to expressly mention States in section 2409a(f), suggests that Congress did not mean the limitations provision to apply to them. As this Court noted in *Wilson v. Omaha Indian Tribe* (1979) 442 U.S. 653, general statutory language will often not be construed to include States, "[p]articularly . . . where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." (*Id.*, at p. 667; accord, *Weber v. Harbor Commissioners, supra,* 85 U.S. (18 Wall.) 57, 70.)

III. SECTION 2409a(f) APPLIES ONLY TO ACTIONS BROUGHT UNDER THE QUIET TITLE ACT; IT DOES NOT APPLY TO ACTIONS AGAINST FEDERAL OFFICERS SUCH AS THIS ONE

The limitations provision of section 2409a(f) applies only to quiet title actions. Suits to restrain wrongful conduct by federal officers involve distinct rights and causes of action that are quite independent of actions in quiet title. One such independent action is a suit for review of agency action under 5 United States Code section 702. We agree with the discussion by the State of North Dakota in its brief concerning actions under section 702 and will not add to that discussion here. Rather, we will discuss actions against federal officers, recognized by this Court for over a century, whereby such individuals can be held accountable for their actions even where asserted federal title to land is incidentally involved. The State of North Dakota has brought such an action here. Such suits have a basis entirely independent of the Quiet Title Act, and that act's statute of limitations is therefore inapplicable.

United States v. Lee, supra, 106 U.S. 196, is the leading case. There, the plaintiff sued federal officers in ejectment regarding their allegedly wrongful possession under a tax deed of Arlington National Cemetery and a military installation. This Court held the tax deed invalid and affirmed judgment for the plaintiff, rejecting the applicability of sovereign immunity. The "suggestion" that title was in the United States was not sufficient to raise the bar. (*Id.,* at p. 210.) Further, because the action was for ejectment against federal officers and not in quiet title against the government itself, the United States would not be bound by res judicata and could itself institute a later action to determine title. (*Id.,* at p. 222.) In succeeding years, the case was repeatedly followed. (E.g., *Land v. Dollar, supra,* 330 U.S. 731, 737, and cases there cited.)

The rationale of *Lee* was narrowed somewhat in *Larson v. Domestic & Foreign Corp.* (1949) 337 U.S. 682, and

Malone v. Bowdoin (1962) 369 U.S. 643, cases whose rationale and unnecessarily harsh impact have been roundly criticized.[16] The cases, however, continue to recognize that persons aggrieved by the wrongful conduct of federal officers may sue for injunctive, declaratory, and related relief. Where such suits are not in effect ones against the United States, the doctrine of sovereign immunity does not apply and the action may proceed. (*Larson, supra,* at pp. 686-688.)

Larson involved an action for injunctive and declaratory relief against a federal agency in which the plaintiff claimed that title to coal at one time admittedly in the United States had since passed to him under the terms of a federal sales contract. This Court held that the suit should have been dismissed as one against the United States, and narrowed the circumstances in which such a suit would lie: the federal agency or officer must either have been acting in excess of his statutory authority, or acting pursuant to an unconstitutional statute. (337 U.S. at pp. 689-691.) *Malone* applied the *Larson* standard to an action in ejectment against a federal officer where the United States claimed record title to the subject land, and no allegations were made under either prong of the *Larson* test for when a federal officer was suable.

The suit filed by North Dakota comes within the ambit of these cases. The State has sued for injunctive relief against federal officers who are exceeding their statutory authority by exercising control over land that the United States does not own and to which it has never had record title. The only possible statutory authority for the federal oil and gas leases in the bed of the Little Missouri River is the Mineral Leasing Act of 1920 (30 U.S.C. § 181, et seq.) or the Mineral Leasing Act for Acquired Lands (30 U.S.C.

---

[16]See, e.g., Scalia, Sovereign Immunity and Public-lands Cases (1970) 68 Mich. L.Rev. 867, 872-875, fn. 29; Hart & Wechsler, The Federal Courts and the Federal System, *supra,* at pp. 1362-1377.

§ 351, et seq.).[17] The leasing authority conferred by both acts is limited to lands and mineral deposits "owned by the United States." (30 U.S.C. §§ 181, 352.) If the lands are not in federal ownership, a purported leasing of them is clearly outside the statutory leasing authority. (See *Andros v. Rupp* (9th Cir. 1970) 433 F.2d 70, 72.) Petitioners concede this. (Petitioners' Br. 21.) And, unlike the situations in *Larson* and *Malone*, the United States has never had record title to the bed of the Little Missouri River. (See also *Hawaii v. Gordon, supra*, 373 U.S. 57, 58 (suit barred because requested relief would cause transfer of land "admittedly belonging to the United States").) The bed of the river is not included within the meanders of the federal public land surveys, and federal surveyors had no authority to determine navigability (*Oklahoma v. Texas* (1922) 258 U.S. 574, 585). Nor did they have jurisdiction to determine the boundary between federal public lands and the States' sovereign lands. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 16-19.)[18] If federal surveyors had not the authority

---

[17]The Mineral Leasing Act of 1920 pertains only to federal public domain lands. (See 41 Stat. 437 (title of act); *Justheim v. McKay* (D. D.C. 1954) 123 F. Supp. 560, 565-566; 40 Op.Atty.Gen. 9 (1941).) The Mineral Leasing Act for Acquired Lands pertains only to lands purchased or condemned by the United States and not subject to the 1920 act because not part of the public domain. (30 U.S.C. § 352; *Wallis v. Pan American Pet. Corp.* (1966) 384 U.S. 63, 65, fn. 2.)

[18]In *Borax*, it was argued that federal surveyors had the power to determine the boundary between federal upland and the State's tidelands. The Court held that the Land Department had jurisdiction only regarding lands "belonging to the United States," and that this did not include tidelands. (*Id.*, at p. 17.) The Court concluded that the question of ownership was one for *judicial* resolution:

> "Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers." (*Id.*, at pp. 18-19.)

to determine navigability or boundary (and hence ownership as between the federal government as littoral owner and the State as the owner of sovereign trust lands), still less do the officials sued here have such authority.

Both before and after the enactment of section 2409a, the lower federal courts have allowed suits against federal officers by private citizens to proceed, even where federal title claims were incidentally involved, where record title did not exist in the United States at some antecedent point in time. In *Andros v. Rupp, supra,* 433 F.2d 70, a plaintiff claiming title sued a federal officer to enjoin interference with use and enjoyment of certain lands asserted by the officer to be part of a national forest. Record title had gone out of the United States and there was no assertion of later-acquired record title. The court distinguished *Larson* and *Malone* on this basis and concluded that the officer was acting outside his statutory authority. Similarly, in *Armstrong v. Udall* (9th Cir. 1970) 435 F.2d 38, the United States claimed record title to land, but the question was whether the survey relied upon physically included within it the land in question. The court ruled that this threshold jurisdictional question would have to be decided, even though this would incidentally determine the merits. (*Id.,* at p. 42.) A similar question is presented here: whether meanders of the river's edge included, as a matter of law, the bed of the river. The answer turns on the question of navigability.

Ritter v. Morton, supra, 513 F.2d 942, is even closer in point. There, a federal patentee of upland riparian to a river sued to enjoin interference by a federal officer with his use and possession of three islands in the bed of the river that he claimed to own. The river had been meandered but there was ambiguity concerning whether the islands were within or without the meander line. The United States of course had no record title to the islands in the riverbed that it could rely on. The court again concluded that a threshold jurisdictional determination was properly

required concerning whether the islands were included in the survey. If they were, then the suit was not barred as against the United States, but was properly brought against the officer.

These cases apply here. At no prior time, or now, has title to the riverbed been "admittedly in the United States." (See *Hawaii v. Gordon, supra,* 373 U.S. at p. 58.) Neither the State nor the federal government can point to record title to the riverbed, since neither claim is based on a specific land description that includes the bed. The federally surveyed meanders of the river run only along the bank, and the State's sovereign title is based on the Constitution, not on any description in a deed. In these circumstances, the suit is properly within the standards for the bringing of such suits against federal officers that are set forth in the cases of this Court and the lower courts.[19] Whether petitioners may be enjoined depends on the threshold determination of the merits of the ownership claim they are asserting. If the federal government doesn't own the bed of the Little Missouri River, they are exceeding their statutory leasing authority.

Nor is this a case within the exception to the *Larson* rule for cases where the relief requested will require the "disposition of unquestionably sovereign property." (See *Larson, supra,* 337 U.S. at p. 691, fn. 11.) The lack of any clear antecedent title in the United States (compare *Larson, supra,* 337 U.S. 682, 703, where the government clearly had title to the coal prior to the sales contract) removes any possible concern that a judgment here will "expend itself on the public domain".

---

[19]Although the issue is not presented in this case, it is our view that, regarding claims by the States to sovereign land, an action would lie against a federal officer even where there was some asserted record title in the federal government. Neither *Larson* nor *Malone* involved title claims to the bed of a navigable waterway based upon the retained sovereignty of the States. (See discussion under argument I, *supra.*)

Neither has section 2409a displaced these traditional actions. In *McClellan v. Kimball* (9th Cir. 1980) 623 F.2d 83, the continuing vitality of these independent actions was recognized. Only because no allegations of the type required by *Larson* and *Malone* were made by the plaintiff did the court feel compelled to treat the suit solely as one under section 2409a. (*Id.*, at pp. 85-86; but see *Cummings v. United States* (5th Cir. 1981) 648 F.2d 289.) Further, merely because the federal government's claimed title is incidentally involved in a lawsuit, that does not operate to funnel all such actions into the category of quiet title actions under section 2409a. Different causes of action may be pursued independently, even though the two actions may share common issues. (See *Sloan Shipyards Corp. v. United States Fleet Corp.* (1922) 258 U.S. 549 (fact that inverse condemnation might lie against the United States did not bar suit against federal agency for recovery of property alleged to have been wrongfully seized); *Larson, supra,* 337 U.S. at pp. 722-723 (Frankfurter, J., dissenting) (remedy under the Tucker Act for just compensation does not displace independent action in tort against federal officer).)

This distinction has a very practical basis. Even if known,[20] a mere conflicting claim to land ownership will not necessarily prompt a lawsuit. The claim may be so obviously weak as to not merit serious concern. More importantly, it may not be paired with any imminent threat to the potential plaintiff's use and enjoyment of the property. In contrast, physical intrusion upon the land by the adverse claimant creates a separate cause of action in tort because of the qualitatively different impact of such conduct on

---

[20]The difficulty that state officers will have in discovering such federal claims has already been alluded to. (Cf. *United States v. Clarke, supra,* 445 U.S. 253, 257-258.) This will be particularly so where the federal claim is not paired with any overt physical invasion of the property so as to more readily put the state officers on notice of the claim.

the plaintiff's legal rights. In short, not only is the threshold at which such adverse claims will prompt litigation different; the cause of action itself, in recognition of the different rights violated, is different. It is one thing to have a mere claim asserted against one's property; it is quite another to have an adverse claimant enter one's property and start using it.

For this reason, it is clear that this suit for an injunction against encroachment upon and development of North Dakota's sovereign lands by federal officers (see par. 14 of Amended Complaint and par. 1 of prayer (Jt. App. 15, 16)) is different in kind from a quiet title action filed under section 2409a in response to a mere claim of title, which often will not be paired with independent tortious conduct. Petitioners' remark that the leasing of the riverbed by federal officers was "largely fortuitous" (Petitioners' Br. 22, fn. 15) does nothing to displace the conclusion that a cause of action separate and distinct from one in quiet title was created by such conduct. No statute of limitations runs on such continuing wrongful conduct by federal officers. (See *Underwater Storage, Inc. v. United States Rubber Co.* (D.C. Cir. 1966) 371 F.2d 950; Rest.2d Torts, § 161, com. b, § 899, com. d.)

Accordingly, because this suit was one that was legitimately pursued independent of the authorization for suit in the Quiet Title Act, that act's statute of limitations does not apply.

CONCLUSION

Because this case proceeds on a basis independent of the provisions of section 2409a, that section's statute of limitations does not apply. But even if the statute would otherwise be applicable to private citizens as the exclusive source of jurisdiction over cases in any way involving title claims adverse to the United States, the section's limitation period cannot be applied, regardless of the proffered justification, as against a State that is asserting title to the bed of a navigable waterway that it claims by right of retained

sovereignty not delegated to the federal government under the Constitution. At the very least, Congress has not spoken with sufficient clarity concerning the applicability of the section's limitation period to state sovereign land claims. To avoid the grave constitutional question that would otherwise be presented, this Court should construe the section's statute of limitations as not applying to the States in the narrow circumstances here presented.

The twenty-eight amici States respectfully request that the decision of the court of appeals be affirmed, in order that the States' sovereign title to navigable waterways across the country might be protected against loss based only on the mere passage of time and a bare claim of federal ownership.

Dated, December 15, 1982

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California

N. GREGORY TAYLOR
Assistant Attorney General

DENNIS M. EAGAN
(Counsel of Record)

BRUCE S. FLUSHMAN
JOSEPH BARBIERI
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650

CHARLES A. GRADDICK
Attorney General of the
State of Alabama

NORMAN C. GORSUCH
Attorney General of the
State of Alaska
MICHAEL W. SEWRIGHT
Assistant Attorney General

ROBERT K. CORBIN
Attorney General of the
State of Arizona
ANTHONY CHING
Solicitor General

JOHN STEVEN CLARK
Attorney General of the
State of Arkansas

RICHARD S. GEBELEIN
Attorney General of the
State of Delaware
J. CALVIN WILLIAMS
Deputy Attorney General

(Continued on next page)

JIM SMITH
Attorney General of the
State of Florida

MICHAEL J. BOWERS
Attorney General of the
State of Georgia

TANY S. HONG
Attorney General of the
State of Hawaii

DAVID H. LEROY
Attorney General of the
State of Idaho

TYRONE C. FAHNER
Attorney General of the
State of Illinois

THOMAS J. MILLER
Attorney General of the
State of Iowa

WILLIAM J. GUSTE, JR.
Attorney General of the
State of Louisiana
GARY L. KEYSER
Assistant Attorney General

FRANK J. KELLEY
Attorney General of the
State of Michigan
LOUIS J. CARUSO
Solicitor General

WARREN SPANNAUS
Attorney General of the
State of Minnesota

MICHAEL T. GREELY
Attorney General of the
State of Montana

RICHARD H. BRYAN
Attorney General of the
State of Nevada

IRWIN I. KIMMELMAN
Attorney General of the
State of New Jersey

ROBERT ABRAMS
Attorney General of the
State of New York

JAN ERIC CARTWRIGHT
Attorney General of the
State of Oklahoma

DAVE FROHNMAYER
Attorney General of the
State of Oregon

LEROY S. ZIMMERMAN
Attorney General of the
Commonwealth of
Pennsylvania

DENNIS J. ROBERTS II
Attorney General of the
State of Rhode Island

DANIEL R. MCLEOD
Attorney General of the
State of South Carolina

MARK V. MEIERHENRY
Attorney General of the
State of South Dakota
ROXANNE GIEDD
Assistant Attorney General

JOHN J. EASTON, JR.
Attorney General of the
State of Vermont
JOHN H. CHASE
Assistant Attorney General

KENNETH O. EIKENBERRY
Attorney General of the
State of Washington

A. G. MCCLINTOCK
Attorney General of the
State of Wyoming

Attorneys for Amici Curiae

Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX. REL.
BOARD OF UNIVERSITY AND SCHOOL LANDS,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS FOR STATE OF COLORADO

J. D. MacFARLANE
Attorney General

CHARLES G. HOWE
Deputy Attorney General

JOEL W. CANTRICK
Solicitor General

JANET L. MILLER
First Assistant Attorney General
Natural Resources Section

KATHLEEN M. BOWERS
Assistant Attorney General
Natural Resources Section

Attorneys for Amicus

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-3611

INDEX

Page

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE QUIET TITLE ACT, 28 U.S.C. 2409a, IS NOT THE EXCLUSIVE BASIS FOR FEDERAL JURISDICTION TO DETERMINE A STATE'S CLAIM OF TITLE TO SOVEREIGN PUBLIC TRUST LANDS 3

II. THE STATUTE OF LIMITATIONS PROVISION OF THE QUIET TITLE ACT, 28 U.S.C. 2409a(f), DOES NOT BAR A STATE FROM MAINTAINING AN ACTION TO DETERMINE TITLE TO ITS PUBLIC TRUST LANDS 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

California v. Arizona, 440 U.S. 59 (1979) 5

Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 5

Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979) 4

Montana v. United States, 450 U.S. 544 (1981) 6

National League of Cities v. Usery,
426 U.S. 833 (1976) 6

Oregon v. Corvallis Sand and Gravel Co.,
429 U.S. 363 (1977) 6

Pollard's Lessee v. Hagan,
44 U.S. (3 How.) 12 (1844) 5, 6

Quern v. Jordan, 440 U.S. 332 (1979) 4, 6

Shively v. Bowlby, 152 U.S. 1 (1894) 4, 5, 6

United States v. California, 332 U.S. 19, (1947) 5

United States v. Mission Rock Co.,
189 U.S. 391 (1903) 5

United States v. Oregon,
295 U.S. 1 (1935) 4

Weber v. Board of Harbor Commissioners,
85 U.S. (18 Wall.) 57 (1873) 6

Constitution and statutes:

United States Constitution, Tenth Amendment 6

5 U.S.C. 701-706 ..... 3, 4

5 U.S.C. 702 4

28 U.S.C. 1331 ..... 2, 3

28 U.S.C. 1361 ..... 2, 3

28 U.S.C. 2201-2202 ..... 2, 4

28 U.S.C. 2409a 3

28 U.S.C. 2409a(f) 2, 3, 5

43 U.S.C. 1301 *et seq.* 3

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX. REL.
BOARD OF UNIVERSITY AND SCHOOL LANDS,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS FOR STATE OF COLORADO

INTEREST OF AMICUS

This case involves whether a state can maintain a suit against the United States to protect the state's interests in its public trust lands. The State of Colorado, through its State Board of Land Commissioners, exercises jurisdiction and control over several thousands of acres of public trust lands. Colorado has entered as an amicus in this case in support of the respondents and of the decision of the Eighth Circuit Court of Appeals which held that the statute of limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f), does not bar an action by a state against the United States to adjudicate ownership of public trust lands.

The United States alleges that this decision was in error and urges this Court to reverse the Eighth Circuit Court of Appeals and further urges this Court to rule that the Quiet Title Act is the exclusive grounds for federal jurisdiction in this case. It would be contrary to Colorado's best interests if this Court were to adopt the position of the United States.

Colorado holds its public lands in trust for the benefit of its citizens. Title to these lands should not be subject to defeasance by the United States by a mere assertion of contrary ownership, as the United States attempted to do in this case, without resolution of the merits of the state's position by the judiciary.

SUMMARY OF THE ARGUMENT

The Quiet Title Act, 28 U.S.C. 2409a, is not the sole basis of federal jurisdiction to determine ownership of public trust lands. In this case, jurisdiction was also proper under the federal question statute (28 U.S.C. 1331), the mandamus statute (28 U.S.C. 1361), the declaratory judgment statute (28 U.S.C. 2201-2202) and

the judicial review provisions of the Administrative Procedures Act (5 U.S.C. 701-706).

The Eighth Circuit Court of Appeals properly held that the statute of limitations of the Quiet Title Act, 28 U.S.C. 2409a(f), does not bar an action by a state to determine ownership of its public trust lands. Under the principle of *quod nullum tempus occurrit regi*, a statute of limitations may not be raised as a defense against a sovereign. In addition, under the equal footing doctrine and the Tenth Amendment to the United States Constitution, a state's ownership of public trust lands is not subject to defeasance by the operation of a federal statute.

I.

THE QUIET TITLE ACT, 28 U.S.C. 2409a, IS NOT THE EXCLUSIVE BASIS FOR FEDERAL JURISDICTION TO DETERMINE A STATE'S CLAIM OF TITLE TO SOVEREIGN PUBLIC TRUST LANDS.

This case involves North Dakota's assertion of title to a portion of the Little Missouri River under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*. The United States has conceded that if the Little Missouri River were navigable at the time of North Dakota's statehood, then the bed of said river belongs to North Dakota. (Petitioners' brief at 15.) However, the United States contends that the issue of navigability must be determined exclusively under the Quiet Title Act, 28 U.S.C. 2409a, since that issue will ultimately determine title to the bed of the river. Colorado disagrees with this position.

In this case, North Dakota originally asserted jurisdiction in the federal district court under the federal question statute (28 U.S.C. 1331), the mandamus statute (28 U.S.C. 1361), the declaratory judgment statutes (28

U.S.C. 2201-2202), and the judicial review provisions of the Administrative Procedures Act (5 U.S.C. 701-706). North Dakota sought a declaration that the Little Missouri River was navigable at the time of North Dakota's statehood. North Dakota further sought an injunction to prevent the Secretary of Interior and the Secretary of Agriculture from exercising ownership, on behalf of the United States, to the bed of the river.

Colorado maintains that North Dakota's basis for jurisdiction in the federal district court was proper. Nevertheless, the district court ordered North Dakota to amend its complaint to include the Quiet Title Act. North Dakota amended its complaint accordingly. Although the Eighth Circuit Court of Appeals declined to rule on whether the amendment was necessary, Colorado agrees with both the United States and North Dakota that this jurisdictional issue is extremely important and merits consideration by this Court.

As indicated above, the ultimate ownership of the Little Missouri River turns on whether said river was navigable at the time of North Dakota's statehood. This Court has previously held that navigability is a federal question. *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Shively v. Bowlby*, 152 U.S. 1 (1894). Also, this Court has declined to disturb a ruling by the Third Circuit Court of Appeals recognizing that the amendments to the Administrative Procedure Act, 5 U.S.C. 702, were designed to allow equitable actions, such as this one, to proceed under 28 U.S.C. 1331. *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

In addition, it is significant that the Quiet Title Act itself does not state that it is intended to provide the exclusive jurisdictional base for determining issues impacting title to land. This legislative silence itself is a significant indication of legislative intent. *Quern v. Jordan*, 440 U.S. 332, 343 (1979).

Nevertheless, the United States claims that navigability, which is a federal question, can only be determined under the Quiet Title Act. The United States also contends that North Dakota could only obtain judicial review of the actions of the Secretary of Interior and the Secretary of Agriculture under the Quiet Title Act since their actions involved assertions of ownership to real property, irrespective of the Administrative Procedures Act and the statutes which provide for injunctive and mandamus relief.

The United States fails to recognize that jurisdiction may be proper under more than one statute. The Quiet Title Act provides *a* method of resolving issues affecting ownership of real property, but it does not provide the only method. *See California v. Arizona*, 440 U.S. 59 (1979).

II.

THE STATUTE OF LIMITATIONS PROVISION OF THE QUIET TITLE ACT, 28 U.S.C. 2409a(f), DOES NOT BAR A STATE FROM MAINTAINING AN ACTION TO DETERMINE TITLE TO ITS PUBLIC TRUST LANDS.

Under the doctrine of *quod nullum tempus occurrit regi*, it is undisputed that a statute of limitations cannot be raised as a defense against a sovereign. *United States v. California*, 332 U.S. 19 (1947); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). It is also without question that a state holding title to public trust lands is an attribute of state sovereignty. *United States v. Mission Rock Co.*, 189 U.S. 391 (1903); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 12 (1844). In recognition of these tenets, the Eighth Circuit Court of Appeals properly held that the statute of limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f), did not bar North Dakota from

maintaining an action to determine title to the bed of the Little Missouri River.

The Eighth Circuit Court of Appeals also properly noted that neither the statute of limitations itself nor its legislative history mentions actions by states. The absence of such an express inclusion is an indication of legislative intent. *Quern v. Jordan*, 440 U.S. 332 (1979); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873).

Nevertheless, the United States maintains that the quiet title statute of limitations should apply because this case involves a suit by an inferior sovereign, North Dakota, against the superior sovereign, the United States. On the contrary, North Dakota is on an equal footing with the United States in this case.

The new states were admitted into the Union on an equal footing, in all respects, with the original thirteen states. A state's title to public trust lands obtained under the doctrine of equal footing is not subject to defeasance by operation of a federal statute. *Montana v. United States*, 450 U.S. 544 (1981); *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Shively v. Bowlby*, 152 U.S. 1, 26 (1893); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1844). The same result obtains under the Tenth Amendment to the United States Constitution. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). Accordingly, in this case, North Dakota's claim of title to the bed of the Little Missouri River cannot be defeated by operation of the quiet title statute of limitations.

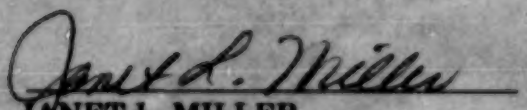
CONCLUSION

A state's right to maintain a suit against the United States to protect the state's interests in its public trust lands should neither be limited to an action solely under the Quiet Title Act nor barred by the statute of limita-

tions of the Quiet Title Act. Accordingly, Colorado urges this Court to affirm the decision of the Eighth Circuit Court of Appeals and to rule that jurisdiction to determine ownership of public trust lands may properly lie outside the Quiet Title Act.

Respectfully submitted,

FOR THE ATTORNEY GENERAL



JANET L. MILLER
First Assistant Attorney General
Natural Resources Section

KATHLEEN M. BOWERS
Assistant Attorney General
Natural Resources Section

Attorneys for Amicus Curiae

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-3611

CERTIFICATE OF SERVICE

I, Janet L. Miller, hereby certify that I am a member of the bar of this Court and counsel of record for The State of Colorado and that on December 16, 1982, pursuant to rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing AMICUS BRIEF of the State of Colorado, by first class mail, postage prepaid, to the following:

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

Department of Justice

ROBERT O. WEFALD
Attorney General of the
State of North Dakota

OWEN L. ANDERSON
Special Assistant
Attorney General

GEORGE DEUKMEJIAN
Attorney General of the
State of California

N. GREGORY TAYLOR
Assistant Attorney General

DENNIS M. EAGAN
(Counsel of Record)

BRUCE S. FLUSHMAN
Deputy Attorneys General

WILSON L. CONDON
Attorney General of the
State of Alaska

ROBERT K. CORBIN
Attorney General of the
State of Arizona

WILLIAM J. 'GUSTE, JR.
Attorney General of the
State of Louisiana

MICHAEL T. GREELY
Attorney General of the
State of Montana

RICHARD H. BRYAN
Attorney General of the
State of Nevada

JAN ERIC CARTWRIGHT
Attorney General of the
State of Oklahoma

DAVID FROHNMAYER
Attorney General of the
State of Oregon

MARK V. MEIERHENRY
Attorney General of the
State of South Dakota

KENNETH O. EIKENBERRY
Attorney General of the
State of Washington

STEVEN FREUDENTHAL
Attorney General of the
State of Wyoming

I certify that all parties required to be served have been served.

Janet L. Miller
First Assistant Attorney General

NO. 81-2337-CFX	TITLE	John R. BLOCK, Secretary of Agriculture, et al., Petitioners v. North Dakota, ex rel. Board of University and School Lands
DOCKETED	COURT	
June 22, 1982		United States Court of Appeals for the Eighth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Solicitor General
	Counsel for Respondents:
June 1, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until July 13, 1982 by Blackmun, J., June 4, 1982.
June 22, 1982	Petition for writ of certiorari filed. (Record filed).
July 23, 1982	Brief for the respondent in opposition filed.
Aug. 25, 1982	DISTRIBUTED. SL21P2
Oct. 4, 1982	Petition GRANTED.

Nov. 12, 1982	Joint appendix filed.
Nov. 12, 1982	Brief for the petitioners filed.
Nov. 29, 1982	Motion of North Dakota, et al. for divided argument to permit amicus curiae California to present oral argument and for additional time for oral argument filed.
Dec. 16, 1982	Brief of respondent, State of North Dakota filed.
Dec. 17, 1982	Brief, amicus curiae, of the State of California, et al., filed.
Dec. 20, 1982	Brief, amicus curiae, of the State of Colorado in support of respondents filed.
Jan. 3, 1983	CIRCULATED.
Feb. 23, 1983	ARGUED.